STATE OF MICHIGAN

IN THE COURT OF CLAIMS

Michigan Automobile Insurance Placement Facility, in its capacity as the administrator of the Michigan Assigned Claims Plan,

Plaintiff,

Civil Action No. 19-000162-MM
Kelly

vs.

Department of Insurance and Financial Services and Anita G. Fox in her official capacity as the Director of the Department of Insurance and Financial Services,

Defendant.

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There is no other pending or resolved civil action arising out of the transaction or occurrence alleged in the complaint.

VERIFIED COMPLAINT FOR INJUNCTIVE RELIEF AND DECLARATORY RULING

SUMMARY

Plaintiff, the Michigan Automobile Insurance Placement Facility ("MAIPF"), in its capacity as the administrator of the Michigan Assigned Claims Plan ("MACP") requests that this Court issue a temporary restraining order and, after a hearing, a preliminary injunction enjoining Defendants, the Department of Insurance and Financial Services ("DIFS") and its Director, Anita G. Fox ("Director"), from instituting any action to enforce their two pronouncements, purported to be "orders", issued on September 20, 2019 and September 24, 2019 (the "Orders") against the

MAIPF or MACP. The purported "orders" are not properly promulgated rules nor orders issued in any contested case in which the MAIPF or MACP was a party. Of particular concern, the Director purports to order the MACP to act contrary to law by (1) refusing to process claims that it receives as required by MCL 500.3172, and (2) prohibiting the MACP from complying with the statutory cap on benefits that is applicable to claims against the MACP filed June 11, 2019 and later. In so ruling, the Director vastly surpassed her regulatory authority and attempted to act in a quasi-legislative role that is prohibited by law.

If DIFS is not enjoined from enforcing its Orders, the MACP, and the MAIPF as the administrator of the MACP, will suffer irreparable harm as they will be exposed to litigation from claimants entitled to benefits and insurers to which the claims are returned. The MACP will also suffer financial losses that will not be recoverable. As demonstrated in the attached Motion and Brief, the MAIPF has a substantial likelihood of success on the merits, the MAIPF and the MACP will be irreparably harmed if enforcement of the Orders is not enjoined, DIFS and its Director face no potential harm from an injunction enjoining enforcement of the Orders, and it is in the interest of the public to stay the Orders.

In support of its Complaint, the MAIPF states as follows:

PARTIES AND JURISDICTION

1. The MAIPF is a statutorily created organization, see MCL 500.3301 *et seq*, primarily responsible for ensuring that automobile insurance coverage is available to any person that is otherwise unable to procure that insurance through ordinary methods. The MAIPF is directed by its Board of Governors ("Board"), as provided in MCL 500.3330. The Michigan Legislature also tasked the MAIPF with adopting and implementing an Assigned Claims Plan (the MACP). See MCL 500.3171–500.3178. The MAIPF and the MACP are funded by statutorily

required assessments under the No-Fault Act which, in turn, are passed on to the driving public. The MAIPF's principal office is located at 17456 N Laurel Park Dr # 130E, Livonia, MI 48152.

2. The MACP, formerly known as the Assigned Claims Facility ("ACF"), was established by the Legislature in 1973 to provide assistance to people injured in an accident involving a motor vehicle when there was no automobile insurance available. MCL 500.3171. The Secretary of State managed the program until December 17, 2012, when the MAIPF was given the task of operating the MACP. The MACP, as a last resort, is responsible for personal injury protection ("PIP") benefits to those no-fault claimants who are injured in an automobile accident when there is no insurance company responsible for the payment of no-fault benefits under the statutory scheme established by Michigan's No-Fault Act. The MACP's principal office is located at 17456 N Laurel Park Dr # 130E, Livonia, MI 48152.

3. Defendant DIFS is a State of Michigan agency created by Executive Order 2013-1.[1] DIFS is an executive agency charged with the responsibility and authority to administer and implement, *inter alia*, the Michigan Insurance Code of 1956, MCL 500.100 *et seq*. DIFS's principal office is located at 530 W Allegan St #7, Lansing, MI 48933.

4. Anita G. Fox is the Director of DIFS. She was appointed Director of the Department of Insurance and Financial Services (DIFS) by Michigan Governor Gretchen Whitmer effective January 14, 2019, and is named in her representative capacity only.

5. This Court has subject-matter jurisdiction over this Complaint pursuant to MCL 600.6419 and has the authority to grant injunctive relief pursuant to MCR 3.310. Because the

[1] DIFS is the successor to the Office of Financial and Insurance Regulation, which was preceded by the Office of Financial and Insurance Services, which was synthesized from the Insurance Bureau Financial Institutions Bureau and the securities functions of the former Corporation, Securities, and Land Development Bureau.

Director has purported to exercise a quasi-legislative function with her Orders, an appeal under the Administrative Procedures Act is not appropriate, and this Court has exclusive jurisdiction. Furthermore, any remand or referral of this matter to DIFS would be futile given that DIFS and the Director have plainly expressed their view of the law in the Orders.

FACTUAL BACKGROUND

6. On June 11, 2019, Public Acts 21 and 22 were signed into law by Governor Gretchen Whitmer. These Public Acts amended Michigan's No-Fault Act, MCL 500.3100 *et seq.* and other related statutes. As part of the amendments to the Act, the following language was added to MCL 500.3172:

> The Michigan automobile insurance placement facility and the insurer to whom a claim is assigned by the Michigan automobile insurance placement facility are only required to provide personal protection insurance benefits under section 3107(1)(a) up to whichever of the following is applicable:
>
> (a) Unless subdivision (b) applies, the limit provided in section 3107c(1)(b).
>
> (b) If the person is entitled to claim benefits under the assigned claims plan under section 3107d(6)(c) or 3109a(2)(d)(ii), $2,000,000.00.

MCL 500.3172(7). Public Acts 21 and 22 were given immediate effect, except as specifically provided by the Legislature within certain statutory provisions.

7. The limit referred to in MCL 500.3172(7)(a) is $250,000. See MCL 500.3107c(1)(b).

8. The limit referred to in MCL 500.3172(7)(b) is $2,000,000 and applies where a person is entitled to benefits under the assigned claims plan under MCL 500.3107d(6)(c) or MCL 500.3109a(2)(d)(ii). However, both MCL 500.3107d(6)(c) and MCL 500.3109a(2)(d)(ii) will not become effective until July 1, 2020, pursuant to the plain language of those provisions.

9. Therefore, until July 2, 2020, the $250,000 limit under MCL 500.3172(7)(a) governs the payment of PIP benefits by the MACP for purposes of MCL 500.3172(7).

10. In addition to placing a limit or cap of $250,000 on claims submitted to the MACP, the Legislature also amended the statutory priority of claims when an accident involves an occupant/passenger or someone not in a vehicle such as a pedestrian. In particular, prior to the Amendments, Section 3114 of the No-Fault Act required an occupant in a vehicle who was injured in an automobile accident, and not otherwise insured, to seek benefits first from the owner of the vehicle, and second from the operator of the vehicle. The same priority scheme governed a situation where a pedestrian was the injured person pursuant to MCL 500.3115. Under the Amendments, a person who suffers accidental bodily injury arising from a motor vehicle accident while an occupant of a motor vehicle who is not covered under their own PIP policy shall now claim PIP benefits from the MACP. MCL 500.3114(4). A person who suffers accidental bodily injury while not an occupant of a motor vehicle (such as a pedestrian) who is not covered under the own PIP policy shall now claim PIP benefits from the MACP. MCL 500.3115(1).

11. Following the Amendments, the MACP has received two types of claims. The first type are claims made directly to the MACP when there is no insurance available for the accident, which is the traditional type of claim made to the MACP. The second type of claims results from the changed priority scheme enacted by the Legislature which makes the MACP responsible for claims by occupants and pedestrians who are not covered under their own PIP policy. Both types of claims are subject to the cap of $250,000, rather than unlimited benefits. MCL 500.3172(7)(a).

12. Once the MACP receives a claim, it is required to make an initial determination of whether the claim is an "eligible" claim because there is no other applicable insurance. If the MACP determines that the claim is eligible for assignment, it assigns the claim to a servicing

insurance company for handling. The servicing insurer or the MACP can request reasonable proof of loss from the claimant, including an examination under oath if appropriate. *See* generally, MCL 500.3173a.

13. The MACP began receiving claims pursuant to the Amendments the day after they became effective on June 11, 2019. Numerous insurers referred claims to the MACP because of the change in the priority scheme enacted by the Legislature. Because it is necessary to confirm that the referring insurer's policy does not provide coverage independent of the statutory change, a number of referrals were made to outside counsel to evaluate the referring insurers' policies to determine if there was coverage, which would make the claim ineligible for MACP coverage.

14. Three months after the entire system shifted as a result of the Amendments becoming effective, DIFS for the first time questioned whether the Amendments were effective upon enactment. The MAIPF provided its legal analysis demonstrating that the Amendments became effective upon enactment, requiring it to consider claims being presented by the referring insurers, among other things.

15. On September 20, 2019, the Director issued what DIFS described as an "order" (the "September 20 Order") (Exhibit A) and posted it on the DIFS website in the same place it places its orders in contested cases. The September 20 Order, however, was not derived from any "contested case."[2] Nor was it a promulgated rule under the Administrative Procedures Act ("APA"), and DIFS has not contended that it is a rule. None of the procedures to promulgate a

[2] "'Contested case' means a proceeding, including rate-making, price-fixing, and licensing, in which a determination of the legal rights, duties, or privileges of a named party is required by law to be made by an agency after an opportunity for an evidentiary hearing. When a hearing is held before an agency and an appeal from its decision is taken to another agency, the hearing and the appeal are considered a continuous proceeding as though before a single agency." MCL 24.203.

rule under the APA were followed with respect to the September 20 Order. Instead, the September 20 Order seeks to enforce the pronouncement made across the insurance industry, as if it is generally applicable to all regulated parties and the MACP, and as if it has the force of law. It does not.

16. The September 20 Order requires insurers to resubmit forms and rates to DIFS for approval before the insurers could refer claims to the MACP as a result of the priority change in MCL 500.3114(4) and 500.3115(1). There is no such requirement in either statute.

17. With respect to the MACP, the Director ordered that:

> The Assigned Claims Plan shall not provide coverage for claims that have been tendered to it under forms that purport to incorporate amendments made by PA 21 and PA 22 that affect the scope of coverage required to be provided under an insurance policy unless those forms have been approved by the Director.

Ex. A, ¶4.

18. Nothing in the statute authorizes the MACP to refuse to provide coverage based on whether DIFS believes it is appropriate to do so. Instead, the MACP's responsibilities are spelled out in the statute. The statute does not contain a provision authorizing the MACP to deny coverage on the basis set forth in the DIFS Order, and the Director cites no such basis in her Order. Thus, the September 20 Order seeks to direct the MACP to not provide coverage as required under the No-Fault Act and, therefore, violate its statutory duties under MCL 500.3171 – 500.3179.

19. On September 24, 2019, the Director posted a second purported "order" on the DIFS website in the section where orders from contested cases are found (the "September 24 Order") (together with the September 20 Order, the "Orders"). But, again, the September 24 Order was not derived from any contested case. While the September 24 Order is aimed at the MAIPF, no underlying hearing was held, MAIPF had no notice of any proceeding purporting to adjudicate its rights, MAIPF did not participate in any proceedings, and MAIPF was not provided the

opportunity to present evidence. It is not a promulgated rule under the APA, nor has DIFS contended that it is a rule. None of the procedures to promulgate a rule under the APA were followed with respect to the September 24 Order. Again, DIFS seeks to enforce the pronouncement contained in the September 24 Order against MAIPF, as if it has the force of law. It does not.

20. The September 24 Order purported to "notify" the MAIPF that "any attempt to rely on the amendments made by PA 21 and PA 22 to cap benefits at $250,000 prior to July 2, 2020, is prohibited" based on the Director's alleged interpretation of MCL 500.3172(7). (Exhibit B). The September 24 Order included an erroneous legal analysis to reach its conclusions that implementing the $250,000 cap on MACP benefits prior to July 2, 2020 would conflict with the purpose of the Insurance Code to protect policyholders, creditors and the public; is not supported by principles of statutory interpretation; and frustrates the intent of other statutory amendments contained in the Insurance Code.

21. The September 24 Order pronounces that "MAIPF shall not impose a $250,000 cap on MACP benefits under Section 3107c(1)(b) of the Code, pursuant to Section 3172(7)(a), prior to July 2, 2020." (*Id.*) This instruction to disregard and not enforce the statute, which makes the cap applicable immediately, is a violation of law.

22. The source of the September 24 Order became immediately apparent. On the same day, a news article was published regarding the September 24 Order, reporting that the Director issued the September 24 Order at the request of Governor Gretchen Whitmer who "used her ***executive authority*** to ***amend*** the enforcement of the no-fault insurance reform legislation she signed in June." (Exhibit C) (emphasis added). According to the article, Governor Whitmer "promised to use ***her powers*** to return complete coverage to auto accident survivors" and "promised ***to make the change*** while in a closed-door meeting with advocates opposing the law."

Id. (emphasis added). The article further provided that "[a]ccording to John Cornack, president of the Eisenhower Center which provides care for those who suffer brain injuries", "the governor's actions were to 'help soften the outcome of the new law' and ***postpone its provisions***." *Id.* (emphasis added). Mr. Cornack was an attendee at the meeting with the Governor. No Executive Order was ever issued.

23. Neither DIFS nor the Director are empowered to postpone the implementation of part of the Amendments for political reasons. While the Director is a member of the Executive Branch, there is nothing in the Michigan Constitution or Michigan law that permits the Governor to legislate from her office by ordering the Director of DIFS to issue orders changing the effective date of the Amendments.

24. DIFS contends it has the power to issue the September 24 Order under MCL 500.205, MCL 500.3171, and its general power to execute the laws in the insurance code under MCL 500.200. But nothing in those statutes allows DIFS to usurp the power of the Legislature to amend statutory law or the power of the judiciary to invalidate laws passed by the Legislature. DIFS's authority to issue orders using its reasonable discretion must be within the authority delegated to it by the Legislature. *Detroit Pub Sch v Conn*, 308 Mich App 234, 242; 863 NW2d 373 (2014) (citations and quotations omitted) ("Administrative agencies have no common-law powers. But the Legislature may confer on an administrative agency the power to enact rules regarding details, to conduct hearings to find facts, and to exercise some discretion in administering a statute."). The Legislature has not, and cannot, delegate the power to legislate to DIFS, and has not given DIFS the authority to determine which claims are or are not covered by the MACP, or when a statute becomes effective. See *Taylor v Smithkline Beecham Corp*, 468

Mich 1, 8; 658 NW2d 127 (2003) (while the Legislature may obtain assistance from the judicial and executive branches, it may not delegate the power to legislate to either).

25. DIFS's orders direct the MACP to violate the law because the purported Orders preclude the MACP from providing coverage for claims that it may determine are valid, and imposes restrictions not in the statute before coverage may be afforded by the MACP. The practical effect of the September 20 Order is that the MACP either returns claims from the servicing insurance carriers to whom they are assigned to the insurers from which they originated or risk administrative attempts to enforce the Order. Moreover, the Order does not allow the MAIPF or MACP to process the claims according to the No-Fault Act's requirements in MCL 500.3172 and 500.3173a, which require the MACP to timely and promptly send claims that it receives for a determination as to whether coverage exists on the claim and, if so, to process the claims accordingly.

26. Forcing the MAIPF and MACP to violate the law is an irreparable injury that exposes them to litigation from both the insurers to whom the MACP returns the files and from the underlying claimants who do not have their claims timely processed.

27. Enforcement of the prohibition against implementing the $250,000 cap also irreparably harms the MACP as it will be required to pay amounts in excess of the $250,000 cap until such time as the litigation resolves or face enforcement action from DIFS. Some of the claims submitted to the MACP are catastrophic claims where the MACP expects that the cap will be exceeded. Once the MACP pays the patients and providers on those claims, there is no effective way for it to recoup the funds paid out. Even if the MAIPF is able to obtain partial repayment from some hospitals, it is doubtful that any of the individuals will be able to repay the sums. Given that the Director of DIFS is ordering the MACP to pay unlimited benefits, the amounts paid could

greatly exceed the cap and will be forever unrecoverable. These costs are ultimately passed on to auto insurance companies by way of assessments, who in turn pass the costs on to the driving public.

28. Neither the Governor, DIFS, a state agency, nor the Director have the authority to postpone the effectiveness of the statutory cap, to pronounce the unambiguous plain language of a statute to be ineffective, or to effectively amend a statute. Moreover, neither the Governor, DIFS, nor the Director have the authority to demand that MAIPF or MACP violate the law by refusing to perform their statutory obligations.

COUNT I—DECLARATORY RELIEF

29. The MAIPF hereby realleges and incorporates the foregoing paragraphs as though fully set forth herein.

30. DIFS issued two purported Orders that do not have the force of law because they are not derived from any law or authority granted to DIFS. The Orders seek to amend legislation passed by delaying the caps on benefits provisions from coming into effect immediately. DIFS does not have the authority to override choices made by the Legislature. An administrative agency, such as DIFS, "cannot exercise legislative power by creating law or changing the laws enacted by the Legislature." *SBC Mich v PSC (In re Complaint of Rovas)*, 482 Mich 90, 98; 754 NW2d 259 (2008). Therefore, by attempting to rewrite the amendments to the No-Fault Act, the Director is usurping the Legislature's power in violation of section 2 of article 3 of the Michigan Constitution of 1963. Const 1963, art 3, § 2. In short, DIFS exceeded its authority when it issued the purported Orders for at least the following reasons:

a. The Director's purported Orders violate the Michigan Constitution's separation of powers principles. While an administrative agency has "quasi-legislative" powers,

such powers are limited to rule making. *In re Complaint of Rovas*, 482 Mich at 98. An administrative agency, such as DIFS, "cannot exercise legislative power by creating law or changing the laws enacted by the Legislature." *Id.* Thus, DIFS cannot promulgate any rule that conflicts with a statute because only the Legislature may make law. See *id.* By attempting to rewrite the amendments to the No-Fault Act, the Director is usurping the Legislature's power in violation of section 2 of article 3 of the Michigan Constitution of 1963. Const 1963, art 3, § 2.

b. Because the Director's Orders are not the result of contested cases, they are not derived from administrative agencies' "quasi-judicial" power. "Administrative agencies exercise what have been described as 'quasi-judicial' powers. However, such power is limited and is not an exercise of constitutional 'judicial power.' The primary 'judicial' function exercised by administrative agencies is confined to conducting contested cases." *In re Complaint of Rovas*, 482 Mich at 98-99. Thus, DIFS has no authority to issue a rule of law by issuing a purported judicial opinion. DIFS's power to adjudicate cases is limited to a fact-finding exercise in contested cases. *Id.* at 98.

c. The Orders do not have the force of law because agencies do not have the power to unilaterally issue pronouncements that have the force of law. *Ass'n of Bus. Advocating Tariff Equity v. Mich. Pub. Serv. Comm'n (In re Reliability Elec. Utils. for 2017-2021)*, 325 Mich App 207, 232-233, 926 NW2d 584 (2018) (quoting *Faircloth v Family Independence Agency*, 232 Mich App 391, 403-404; 591 NW2d 314 (1999) ("An agency should resort to formal APA rulemaking when establishing policies that 'do not merely interpret or explain the statute or [rules from which the

agency derives its authority,' but rather 'establish the substantive standards implementing the program.'"). "An agency . . . may not avoid the requirements for promulgating rules by issuing its directives under different labels." *Id.* at 233. See also, *Detroit Edison Co v Dep't of Treasury*, 498 Mich 28, 45; 869 NW2d 810 (2015) (finding that, for an agency regulation of general applicability to have the force of law, it must fall under the definition of a properly promulgated rule).

d. Even where an administrative agency interprets a statute, its interpretation cannot conflict with the plain meaning of the statute. *In re Complaint of Rovas*, 482 Mich at 108. To the extent that the DIFS Orders are based on its interpretation of the Insurance Code, they are invalid, as they demand that the MACP violate the No-Fault Act's plain language.

e. DIFS has no authority to alter the claims that the MACP must accept for assignment. DIFS only has the narrow authority granted to it under MCL 500.3171 to appoint four of eleven governors to the MAIPF's Board, to approve the assigned claims plan, which occurred long ago, and make a report to the senate a year after the plan is approved, which also already occurred. The MACP is not a regulated entity like an insurance company or insurance producer. It only applies if there is no insurance policy at issue. The Legislature has made the decision as to what claims the MACP must accept and the limits on benefits the MACP must pay—DIFS does not have the authority to alter those decisions. Thus, DIFS has no authority to make the proclamations in its Orders.

f. DIFS has no authority to ban conduct that is in conformity with the Insurance Code. Any such attempt would exceed the power delegated to DIFS by the Legislature. See *Ins Institute v Commissioner*, 486 Mich 370, 407; 785 NW2d 67 (2010).

31. DIFS does not have the authority to issue rulings of general applicability without promulgating a rule under the APA. Because the Director's purported Orders were not promulgated rules, they do not have the force of law and, thus, are not enforceable. *Detroit Edison*, 498 Mich at 45. Moreover, no contested case existed in which the MAIPF participated to adjudicate its rights.

32. DIFS may not instruct the MACP as to which claims it will or will not cover, nor does it have the power to override the Legislature's determination that a statute is given immediate effect.

33. The MAIPF therefore seeks, in addition to an injunction staying the enforcement of the Orders, a Declaratory Ruling that the Orders are void and unenforceable as to the MAIPF and MACP.

COUNT II – INJUNCTIVE RELIEF

34. The MAIPF hereby realleges and incorporates the foregoing paragraphs as though fully set forth herein.

35. As explained above, DIFS and its Director seek to demand that the MAIPF and MACP violate the law and contend that DIFS and its Director have the authority to enforce the Orders against the MAIPF and MACP.

36. DIFS and its Director should be enjoined from seeking to enforce the Orders for the following reasons:

a. The Director's purported Orders violate the Michigan Constitution's separation of powers principles. While an administrative agency has "quasi-legislative" powers, such powers are limited to rule making. *In re Complaint of Rovas*, 482 Mich at 98. An administrative agency, such as DIFS, "cannot exercise legislative power by creating law or changing the laws enacted by the Legislature." *Id.* Thus, DIFS cannot promulgate any rule that conflicts with a statute because only the Legislature may make law. See *id.* By attempting to rewrite the Amendments, the Director is usurping the Legislature's power in violation of section 2 of article 3 of the Michigan Constitution of 1963. Const 1963, art 3, § 2.

b. Because the Director's Orders are not the result of contested cases, they are not derived from administrative agencies' "quasi-judicial" power. DIFS has no authority to issue a rule of law by issuing a purported judicial opinion. DIFS's power to adjudicate cases is limited to fact-finding in contested cases. *Id.* at 98.

c. The Orders do not have the force of law because agencies do not have the power to unilaterally issue pronouncements that have the force of law. *In re Reliability Elec. Utils. for 2017-2021*, 325 Mich App at 232-233 (quoting *Faircloth*, 232 Mich App at 403-404)("An agency should resort to formal APA rulemaking when establishing policies that 'do not merely interpret or explain the statute or [rules from which the agency derives its authority,' but rather 'establish the substantive standards implementing the program.'"). "An agency . . . may not avoid the requirements for promulgating rules by issuing its directives under different labels." *Id.* at 233. See also, *Detroit Edison Co*, 498 Mich at 45 (finding that, for an agency regulation of

general applicability to have the force of law, it must fall under the definition of a properly promulgated rule).

d. Even where an administrative agency interprets a statute, its interpretation cannot conflict with the plain meaning of the statute. *In re Complaint of Rovas*, 482 Mich at 108. To the extent that DIFS Orders are based on its interpretation of the Amendments, they are invalid, as they seek to demand that the MACP violate the Amendments' plain language.

e. DIFS has no authority to alter the claims that the MACP must accept for assignment. The Legislature has made the decision as to what claims the MACP must accept and the limits on benefits the MACP must pay—DIFS does not have the authority to alter those decisions. Thus, DIFS has no authority to make the proclamations in its Orders.

f. DIFS has no authority to ban conduct that is in conformity with the Insurance Code. Any such attempt would exceed the power delegated to DIFS by the Legislature. See *Ins Institute v Commissioner*, 486 Mich at 407.

37. As established in the accompanying Motion for Preliminary Injunction and Brief, with these arguments the MAIPF has a likelihood of success on the merits.

38. The MAIPF and MACP will suffer irreparable harm if DIFS's purported Orders are not restrained and DIFS is allowed to take enforcement action, requiring the MACP to violate the law, resulting in exposure to litigation from claimants, whose benefits are delayed, and insurers, to whom claims are returned, in addition to incurring financial losses that are not recoverable. Alternatively, if the MAIPF and MACP violate the Orders, they will become the target of enforcement and disciplinary action by DIFS and its Director.

39. DIFS will not be harmed by a temporary restraining order because it has no authority to amend legislation, or to order the MAIPF or MACP to violate the Amendments. DIFS cannot be harmed by the non-enforcement of its invalid and unauthorized Orders.

40. It is in the public interest to stay the Orders because numerous claimants will be delayed receiving benefits, which undermines the very purposes of the No-Fault Act to provide fast payment for economic losses, specifically, medical bills, wage loss, and replacement services without the need to initiate a tort suit. *Shavers v Attorney General*, 402 Mich 554, 622; 267 NW2d 72 (1978). Moreover, an injunction merely preserves the enforcement of the No-Fault Act, as written and prevents an unconstitutional usurping of Legislative power by DIFS.

41. The weighing of the interests between the parties favors the MACP because it is in the public interest for an administrative agency to comply with the plain language of the statutory amendments put in place by Michigan's Legislature, and passed by more than a two-thirds vote.

RELIEF SOUGHT

WHEREFORE, the MAIPF, on behalf of the MACP, requests this Court ENJOIN DIFS and its Director from enforcing their purported Orders of September 20, 2019 and September 24, 2019 and declare that:

(i) DIFS's purported Orders of September 20, 2019 and September 24, 2019 are not enforceable because DIFS, as an administrative agency, and its Director do not have the authority to issue orders of general applicability that have the force of law, the violation of which may result in enforcement action. Any rules of general applicability must be promulgated under the APA and are limited to falling within the scope of authority delegated to DIFS by the Legislature.

(ii) DIFS does not have the authority to amend or alter Michigan law, and any attempt to do so, is a violation of separation of power principles under Michigan's Constitution.

(iii) The purported Orders of September 20, 2019 and September 24, 2019 demand that the MAIPF and MACP violate the plain language of the No-Fault Act. DIFS does not have the authority to impose its Orders on the MAIPF or MACP and, as a result, the purported Orders of September 20, 2019 and September 24, 2019 are unenforceable.

(iv) The cap set forth in MCL 500.3172(7) became effective on June 11, 2019.

Respectfully submitted,

DYKEMA GOSSETT PLLC

Date: October 14, 2019

By: Lori McAllister

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VERIFICATION

I hereby verify that the factual contents of this Complaint For Injunctive Relief And Declaratory Ruling are based on my knowledge and investigation, and are true to the best of my knowledge.

Dated: October 14, 2019

Kimberly Bezy

Tab A

STATE OF MICHIGAN
DEPARTMENT OF INSURANCE AND FINANCIAL SERVICES

Before the Director of the Department of Insurance and Financial Services

In the matter of:

Requirement to File Forms and Rates Prior to Implementing Public Acts 21 and 22

Order No. 19-048-M

Issued and entered
this 20th day of September 2019
By Anita G. Fox
Director

I. BACKGROUND

Public Acts 21 and 22 of 2019 (PA 21 and PA 22) were enacted into law on June 11, 2019. Several provisions of the Insurance Code (Code) that were amended by PA 21 and PA 22 (amended provisions) were effective June 11, 2019; other provisions are not effective until July 2, 2020. It has come to the Director's attention that a limited number of automobile insurers have attempted to apply the amended provisions to claims made under existing, in-force policies without first submitting revised forms and rates for the Director's review and approval. Regardless of their effective date, amended provisions that affect the scope of coverage required to be provided under automobile policies may not be implemented until automobile insurers have submitted revised forms and rates for the Director's review and approval. Such amended provisions include, but are not limited to, Sections 3009, 3111, 3113, 3114, and 3115, MCL 500.3009, 500.3111, 500.3113, 500.3114, and 500.3115.

This order notifies automobile insurers that any attempt to implement the amended provisions that affect the scope of coverage required to be provided under an insurance policy without submitting revised policy forms and rates to DIFS for review and approval would violate Sections 2106, 2108, and 2236 of the Code, MCL 500.2106, 500.2108, and 500.2236.

II. ANALYSIS

Pursuant to Sections 2106, 2108, and 2236 of the Code, MCL 500.2106, 500.2108, and 500.2236, forms and rates are subject to the Director's review and disapproval. These sections of the Code were unchanged by PA 21 or PA 22 and remain the requisite procedure prior to a company's form or rate use. Section 2106(3)[1] provides that an insurer "may use rates for automobile insurance ... as soon as those rates are filed," which requires that the rates are filed with the Director.[2] Section 2108(6) provides: "An insurer shall not make, issue, or renew a contract or policy except in accordance with filings that are in effect for the

[1] This section was amended by PA 21 and PA 22, but the amendments are not effective until July 2, 2020.
[2] Rate filings must comply with all applicable sections of the Code, including but not limited to Sections 2109 and 2110, MCL 500.2109 and 500.2110.

insurer under this chapter." Section 2236(1) provides that "an insurer shall not deliver or issue for delivery in this state a basic insurance policy form ... unless a copy of the form is filed with the department and approved by the director as conforming with the requirements of this act and not inconsistent with the law." Section 2236(5) of the Code establishes the Director's broad authority to disapprove, withdraw approval, or prohibit the issuance of all types of insurance policy forms, and permits the Director to "... prohibit the issuance, advertising, or delivery of a form to any person in this state if the form violates this act, contains inconsistent, ambiguous, or misleading clauses, or contains exceptions and conditions that unreasonably or deceptively affect the risk purported to be assumed in the general coverage of the policy." Insurers that implement the amended provisions that affect the scope of coverage required to be provided under automobile insurance policies without first revising their forms or rates are in violation of Sections 2106, 2108, and 2236 of the Code, MCL 500.2106, 500.2108 and 500.2236.

In addition, any attempt by automobile insurers to rely on a "conformity to law clause" [3] within their policies as a way to adopt the amended provisions without substantively revised forms would constitute a violation of Section 2236(5) of the Code as reliance upon an insurance policy provision that "unreasonably and deceptively affect[s] the risk purported to be assumed in the general coverage of the policy."

Finally, the Code prohibits automobile insurers from reducing the coverage available under a policy without first providing notice to policyholders. Under Section 2104(5) of the Code, MCL 500.2104(5), the offering of coverage with less favorable terms or conditions than those previously provided is considered to be a "termination" unless the reduction in coverage was requested by the policyholder or if the terms and conditions of the coverage previously provided were no longer available from the insurer anywhere in Michigan. Further, when an insurer fails to provide notice to a policyholder of a reduction in coverage, the insurer is bound to the original coverage when the reduction was not brought to the insured's attention. See, e.g., *Casey v Auto-Owners Ins Co*, 273 Mich App 388 (2006).

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Director FINDS and CONCLUDES that:

1. Several provisions of the Code that were amended by PA 21 and PA 22 affect the scope of coverage required to be provided under automobile insurance policies.

2. PA 21 and PA 22 did not amend Sections 2106, 2108, and 2236 of the Code, MCL 500.2106, 500.2108, and 500.2236, which subject insurance policy forms and rates, and any revisions thereto, to DIFS' review and approval.

3. Implementation of statutory amendments that affect the scope of coverage required to be provided under an insurance policy without first revising insurance policy forms and rates to account for coverage reductions and then submitting such forms and rates to DIFS for

[3] This includes any clause that purports to "conform" a policy to a change in law without providing notice to policyholders, and can take the form of a "conformity to state law" clause or a policy provision that generically states that coverage is to be afforded "pursuant to Michigan law" or similarly broad language.

review and approval would violate Sections 2106, 2108, and 2236 of the Code, MCL 500.2106, 500.2108, and 500.2236.

4. Implementation of statutory amendments that affect the scope of coverage required to be provided under an insurance policy through reliance on a "conformity to law clause " would violate Section 2236(5) of the Code, MCL 500.2236(5), as reliance upon an insurance policy provision that "unreasonably and deceptively affect[s] the risk purported to be assumed in the general coverage of the policy."

5. Failure by an automobile insurer to provide written notice to policyholders regarding reductions to coverage provided under an insurance policy is contrary to Section 2104(5) of the Code, MCL 500.2104(5), and Michigan case law.

III. ORDER

Therefore, it is ORDERED that:

1. No automobile insurer shall incorporate amendments made by PA 21 and PA 22 that affect the scope of coverage required to be provided under an insurance policy into a policy form without first submitting its revised forms and rates for the Director's review and approval.

2. An automobile insurer shall not rely on "conformity to law clauses" or other similar provisions in its policy forms as a method of incorporating the statutory amendments that affect the scope of coverage required to be provided under an insurance policy under PA 21 and PA 22.

3. Any automobile insurer that wishes to revise its policy forms must submit revised forms and rate revisions to the Director for approval. The Director will disapprove any form or rate filings that incorporate statutory amendments prior to their effective date.

4. Any automobile insurer that has processed claims in accordance with the statutory amendments that affect the scope of coverage required to be provided under an insurance policy without first submitting revised forms and rates for the DIFS' review and approval shall immediately re-process those claims in accordance with the terms and conditions of the existing policy form.

5. The Assigned Claims Plan shall not provide coverage for claims that have been tendered to it under forms that purport to incorporate amendments made by PA 21 and PA 22 that affect the scope of coverage required to be provided under an insurance policy unless those forms have been approved by the Director.

6. Failure to comply with the form and rate filing and approval requirements of the Code and/or failing to comply with this Order will result in disapproval or withdrawal of approval of the form or rate and may subject the insurer to appropriate administrative action.

The Director specifically retains jurisdiction of the matters contained herein and the authority to issue such further orders and take such further actions as she shall deem just, necessary and appropriate.

Anita G. Fox
Director

Tab B

STATE OF MICHIGAN
DEPARTMENT OF INSURANCE AND FINANCIAL SERVICES

Before the Director of the Department of Insurance and Financial Services

In the matter of:

Effective Date of the Cap on PIP Benefits
Provided Under the Michigan Assigned Claims Plan

Order No. 19-049-M

Issued and entered
this 24th day of September 2019
by Anita G. Fox
Director

I. BACKGROUND

Public Acts 21 and 22 of 2019 were enacted into law on June 11, 2019. Several provisions of the Insurance Code (Code) that were amended by PA 21 and PA 22 were effective June 11, 2019; other provisions are not effective until July 2, 2020.

It has come to the Director's attention that the Michigan Automobile Insurance Placement Facility (MAIPF), which administers the Michigan Assigned Claims Plan (MACP), may attempt to impose a $250,000 cap on benefits under Section 3107c(1)(b) of the Code, pursuant to Section 3172(7)(a), prior to July 2, 2020.

The authority for this order is derived from the following:

- the authority conferred upon the Department of Insurance and Financial Services (DIFS) pursuant to Section 200 of the Code, MCL 500.200, and its obligation to execute the laws of this state in relation to insurance;

- the Director's authority to issue orders in the reasonable exercise of discretion pursuant to Section 205 of the Code, MCL 500.205, with the intent to adhere to the Code's long-standing legislative purpose to protect policyholders, creditors and the public; and

- the Director's supervisory authority over the MAIPF and MACP as set forth in Sections 3171(3) and 3171(4) of the Code, MCL 500.3171(3); MCL 500.3171(4).

Pursuant to the above authority, this order notifies the MAIPF that any attempt to rely on the amendments made by PA 21 and PA 22 to cap benefits at $250,000 prior to July 2, 2020, is prohibited.

II. ANALYSIS

Pursuant to Section 3172(7)(a) of the Code, "the [MACP] and the insurer to whom a claim is assigned by the [MACP] are only required to provide personal protection insurance benefits under section 3107(1)(a) up to ... [$250,000]." *See* MCL 500.3172(7)(a); MCL 500.3107c(1)(b). An exception exists to the imposition of the $250,000 cap if the injured person claims benefits through the MACP when, pursuant to Section 3107 or 3019a(2), the person is injured during the 30-day window in which the person had a lapse in qualified health insurance or other health and accident coverages. In that case, the capped amount totals $2,000,000. *See* MCL 500.3172(7)(b).

Adherence to sound principles of statutory construction against rendering any part of a statute surplusage or nugatory requires that the effective date of the entirety of Section 3172(7) is July 2, 2020. *See Badeen v PAR, Inc*, 496 Mich 75, 81; 853 NW2d 303 (2014) ("When reviewing a statute, courts should avoid a construction that would render any part of the statute surplusage or nugatory.").

The Code "was enacted for the benefit of the public and the insurance laws should be liberally construed in favor of policy holders, creditors and the public." *See Murphy v Seed-Roberts Agency, Inc.*, 79 Mich App 1, 9 (1977) (citing *Dearborn National Ins Co v Comm'r of Insurance*, 329 Mich 107, 118 (1950); *Comm'r of Insurance v American Life Ins Co*, 290 Mich 33, 43-44 (1939)). *See also King v State*, 488 Mich 208, 218 (2010) ("The extensive regulation of the insurance industry provided for in [the Insurance Code] indicates a legislative purpose to protect policyholders.") (citing *In re Certified Question*, 413 Mich 22, 38 (1982)).

Per the plain language of Section 3172(7)(b), subdivision (7)(b) applies if a person is entitled to claim benefits "under the [MACP] under section 3107d(6)(c) or 3109a(2)(d)(ii) ..." Because the effective date of Sections 3107d and 3109a(2) is expressly July 2, 2020, there is no person who can claim benefits from the MACP under those sections until July 2, 2020, which would render Section 3172(7)(b) meaningless unless its effective date is also July 2, 2020. Subdivisions 7(a) and 7(b) of Section 3172 are interdependent: 7(a) explicitly references 7(b). To avoid a meaningless interpretation of Section 3172(7)(b), the entirety of Section 3172(7) must take effect on July 2, 2020, precluding the MACP from imposing a $250,000 cap on benefits until that date. This interpretation allows Section 3172(7) to function in a coherent manner and is consistent with the fundamental principles of statutory construction noted above.

The interpretation of Section 3172(7) as having an effective date of July 2, 2020, is further supported by reference to other amendments made by PA 21 and PA 22. In this regard, Section 3009 of the Code, MCL 500.3009, sets forth various liability coverage limits with an effective date of July 2, 2020. If the Director interpreted Section 3172(7) as having an effective date prior to July 2, 2020, pedestrians and uninsured occupants who claim benefits from the MACP subject to the $250,000 cap, and whose expenses exceed that amount, will be able to sue an at-fault driver for the remainder. However, the defendant driver would be limited to the pre-amendment residual liability protections, and any amount of liability over those amounts could subject the defendant to significant financial harm. This potentially catastrophic exposure to residual liability—which was not contemplated by the policyholder at the time of entry into the existing insurance contract—contravenes the Code's long-standing legislative purpose of policyholder protection.

II. FINDINGS OF FACT

The Director FINDS that:

1. Public Acts 21 and 22 of 2019 were enacted into law on June 11, 2019. Several provisions of the Insurance Code (Code) that were amended by PA 21 and PA 22 were effective June 11, 2019; other provisions are not effective until July 2, 2020.

2. It has come to the Director's attention that the Michigan Automobile Insurance Placement Facility (MAIPF), which administers the Michigan Assigned Claims Plan (MACP), may attempt to impose a $250,000 cap on benefits under prior to July 2, 2020.

3. The Code was enacted for the benefit of the public, and the Director must interpret it in favor of policyholders and the public.

II. CONCLUSIONS OF LAW

The Director CONCLUDES:

1. Implementation of the $250,000 cap on MACP benefits under Section 3107c(1)(b) of the Code, pursuant to Section 3172(7), prior to July 2, 2020, would conflict with the longstanding legislative purpose of the Code to protect policyholders, creditors and the public.

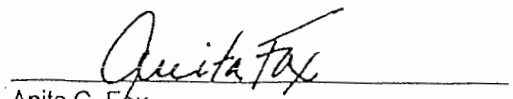
2. Implementation of the $250,000 cap on MACP benefits under Section 3107c(1)(b) of the Code, pursuant to Section 3172(7), prior to July 2, 2020, ignores sound principles of statutory construction.

3. Implementation of the $250,000 cap on MACP benefits under Section 3107c(1)(b) of the Code, pursuant to Section 3172(7), prior to July 2, 2020, frustrates the intent of other statutory amendments, including the residual liability protections contained in Section 3009 of the Code, MCL 500.3009.

III. ORDER

Therefore, it is ORDERED that the MAIPF shall not impose a $250,000 cap on MACP benefits under Section 3107c(1)(b) of the Code, pursuant to Section 3172(7)(a), prior to July 2, 2020.

The Director specifically retains jurisdiction of the matters contained herein and the authority to issue such further orders as she shall deem just, necessary and appropriate.



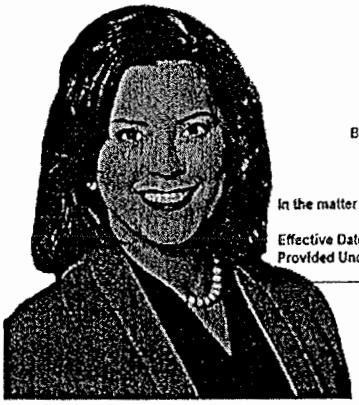
Anita G. Fox
Director

Tab C

Shadrach Strehle Sep 24

BREAKING: Gov. Whitmer Retreats From No-Fault Changes

Michigan Department of Insurance and Financial Services Issues Order Halting Enforcement



STATE OF MICHIGAN
DEPARTMENT OF INSURANCE AND FINANCIAL SERVICES

Before the Director of the Department of Insurance and Financial Services

In the matter of:

Effective Date of the Cap on PIP Benefits
Provided Under the Michigan Assigned Claims Plan

Order No. 19-049-M

Issued and entered
this 24th day of September 2019
by Anita G. Fox
Director

LANSING (Great Lakes News) - Gov. Gretchen Whitmer used her executive authority to amend the enforcement of the no-fault insurance reform legislation she signed in June. Director of the Michigan Department of Insurance and Financial Services Anita G. Fox issued a Director's Order postponing the $250,000 cap on personal injury protection established by the legislation per the governor's request.

Whitmer promised to make the change while in a closed-door meeting with advocates opposing the law. According to John Cornack, president of the Eisenhower Center which provides care for those who suffer brain injuries, Whitmer promised to use her powers to return complete coverage to auto accident survivors. Whitmer was reportedly moved by stories of life-altering injuries going untreated since she signed the law.

Cornack said the governor's actions were to "help soften the outcome of the new law" and postpone its provisions. Previously, the law phased out no-fault coverage in preparation for its full effects in July, 2020. CPAN (Coalition Protecting Auto No-Fault) reportedly "thanked her for her actions."

"This is a very good sign that the governor cares about the damage that's been done by this bill to so many," said John Gwynne Prosser II, President of the Neurotrauma Association. "It's a good first step."

The law's full effects, including the $250,000 cap on personal injury protection, will be implemented on July 1, 2020. Activists will march in Lansing on Wednesday protesting the law and urging its reexamination before the July start date.

STATE OF MICHIGAN

IN THE COURT OF CLAIMS

Michigan Automobile Insurance Placement Facility, in its capacity as the administrator of the Michigan Assigned Claims Plan,

Plaintiff,

Civil Action No. 19-000162 -MM
Kelly

vs.

Department of Insurance and Financial Services and Anita G. Fox in her official capacity as the Director of the Department of Insurance and Financial Services,

Defendant.

Lori McAllister (P39501)
Erin A. Sedmak (P78282)
Attorneys for Plaintiff
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10/14/19 PLAINTIFF'S MOTION FOR ENTRY OF A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

Plaintiff, the Michigan Automobile Insurance Placement Facility, in its capacity as the administrator of the Michigan Assigned Claims Plan ("Plaintiff"), moves this Court for a temporary restraining order and preliminary injunction, pursuant to MCR 3.310, enjoining Defendants, the Department of Insurance and Financial Services and its Director, Anita G. Fox ("Defendants"), from enforcing two pronouncements, purported to be orders, issued on September 20, 2019 (order 19-048-M) and September 24, 2019 (order 19-049-M) (the "Orders").[1] Defendants

[1] While this motion uses the term "Orders" to refer to the documents issued by DIFS, as explained herein, these two documents are not directives within DIFS's authority and, as such, are not "orders" resulting from a contested case.

exceeded their authority in issuing these purported Orders, which do not have the force of law, are unenforceable, and are attempts to usurp the power of the Legislature in violation of section 2 of article 3 of Michigan's Constitution. The Orders direct Plaintiff to violate Michigan law, thereby exposing Plaintiff to immediate irreparable harm if a temporary restraining order is not issued.

WHEREFORE, for the reasons as more fully set forth in the accompanying Brief, the Michigan Automobile Insurance Placement Facility, on behalf of the Michigan Assigned Claims Plan, respectfully requests that this Court GRANT Plaintiff's motion, ISSUE a temporary restraining order enjoining the enforcement of the Orders, and ISSUE an Order to Show Cause why the Court should not preliminarily enjoin Defendants, and award such additional relief as may be appropriate. A copy of this Motion is being served on Defendants with the Complaint.

Respectfully submitted,

DYKEMA GOSSETT PLLC

Date: October 14, 2019

By: Lori McAllister

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STATE OF MICHIGAN

IN THE COURT OF CLAIMS

Michigan Automobile Insurance Placement Facility, in its capacity as the administrator of the Michigan Assigned Claims Plan,

Plaintiff,

Civil Action No. 19-000162-MM
Kelly

vs.

Department of Insurance and Financial Services and Anita G. Fox in her official capacity as the Director of the Department of Insurance and Financial Services,

Defendant.

Lori McAllister (P39501)
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Attorneys for Plaintiff
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10/14/19 BRIEF IN SUPPORT OF PLAINTIFF'S MOTION FOR ENTRY OF A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

INTRODUCTION

Plaintiff, the Michigan Automobile Insurance Placement Facility ("MAIPF"), in its capacity as the administrator of the Michigan Assigned Claims Plan ("MACP") requests that the Court issue a temporary restraining order and, after a hearing, a preliminary injunction enjoining Defendants, the Department of Insurance and Financial Services ("DIFS") and its Director, Anita G. Fox ("Director"), from instituting any action to enforce their two purported orders, issued on September 20, 2019 (order 19-048-M) and September 24, 2019 (order 19-049-M) (the "Orders"). The purported "Orders" are not properly promulgated rules nor orders issued in any contested case in which the MAIPF was a party. Of particular concern, the Director purports to order the MACP to act contrary to law by (1) refusing to process claims that it receives as required by MCL 500.3172, and (2) prohibiting the MACP from complying with the statutory cap on benefits that is applicable to claims against the MACP which became effective on June 11, 2019. In so ruling, the Director vastly surpassed her regulatory authority and attempted to act in a quasi-legislative role that is prohibited by law.

An injunction is necessary here to preserve the *status quo*. The MAIPF has a strong likelihood of success on the merits because the Orders were not issued under any authority granted to DIFS; they are an attempt to unconstitutionally usurp the power of the Legislature; and they demand that the MAIPF cause the MACP to violate the No-Fault Act. If DIFS is not enjoined from enforcing its Orders, the MAIPF will suffer irreparable harm as it will be exposed to litigation from claimants entitled to benefits and insurers for claims resulting from the priority change made by the Legislature as part of the No-Fault Amendments. The MACP will also suffer financial losses that will not be recoverable if it is not permitted to enforce the statutory cap on benefits enacted in MCL 500.3172(7). DIFS will not be prejudiced in any way by the injunction.

Moreover, an injunction is in the best interest of the public, as the practical effects of the Orders are ultimately harmful to the driving public who end up funding the MACP through their insurance premiums. The MAIPF's Verified Complaint is attached as Exhibit 1.

BACKGROUND

On June 11, 2019, Public Acts 21 and 22 became effective, amending Michigan's No-Fault Act, MCL 500.3100 *et seq.* (the "Amendments") and related statutes, and were given immediate effect, except as specifically provided by the Legislature within certain statutory provisions. The Amendments added subsection (7) to MCL 500.3172, which imposes limits on benefits paid on claims assigned to the MACP to $250,000, under MCL 500.3172(a), unless a claimant is entitled to benefits under (7)(b).[2] In addition to placing a cap on claims submitted to the MACP, the Legislature also amended the statutory priority of claims when an accident involves an occupant (passenger) or non-occupant (pedestrian). Prior to the amendments, MCL 500.3114 and 500.3115 required occupants and non-occupants injured in an automobile accident, to seek benefits first from the owner of the vehicle, and second from the operator of the vehicle. Now, under the Amendments, an occupant or non-occupant who is not covered under their own PIP policy, shall claim PIP benefits from the MACP. MCL 500.3114(4); MCL 500.3115(1).

The MACP began receiving claims pursuant to the Amendments the day after they became effective on June 11, 2019. The MACP receives two type of claims. The first type are claims made directly to the MACP when there is no insurance available for the accident, which is the traditional type of claim made to the MACP. The second type of claims results from the changed

[2] The limit referred to in MCL 500.3172(7)(b) is $2,000,000 and applies where a person is entitled to benefits under the assigned claims plan under MCL 500.3107d(6)(c) or MCL 500.3109a(2)(d)(ii). However, there will be no claimants under those provisions until after July 1, 2020, pursuant to the plain language of those provisions.

priority scheme enacted by the Legislature which makes the MACP responsible for claims by occupants and pedestrians who are not covered under their own PIP policy. Both types of claims are subject to the cap of $250,000, rather than unlimited benefits. MCL 500.3172(7)(a).

Once the MACP receives a claim, it is required to make an initial determination of whether the claim is an "eligible" claim because there is no other applicable insurance. If the MACP determines that the claim is eligible for assignment, it assigns the claim to a servicing insurance company for handling. The servicing insurer or the MACP can request reasonable proof of loss from the claimant, including an examination under oath if appropriate. *See* generally, MCL 500.3173a. Numerous insurers referred claims to the MACP because of the change in the priority scheme enacted by the Legislature. Because it is necessary to confirm that the referring insurer's policy does not provide coverage independent of the statutory change, a number of referrals were made to outside counsel to evaluate the referring insurers' policies to determine if there is coverage and the claim is therefore ineligible for the MACP.

Three months after the entire system shifted as a result of the effectiveness of the Amendments on June 11, 2109, DIFS for the first time questioned whether the Amendments were effective upon enactment. The MAIPF provided its legal analysis to DIFS, demonstrating that the Amendments became effective upon enactment, requiring the MACP to consider claims being presented by the referring insurers, among other things. Shortly thereafter, on September 20, 2019, the Director issued what DIFS described as an "order" (the "September 20 Order") (Exhibit 1A) and posted it on the DIFS website in the same place it places its orders in "contested cases."[3] The

[3] "'Contested case' means a proceeding, including rate-making, price-fixing, and licensing, in which a determination of the legal rights, duties, or privileges of a named party is required by law to be made by an agency after an opportunity for an evidentiary hearing. When a hearing is held before an agency and an appeal from its decision is taken to another agency, the hearing and the appeal are considered a continuous proceeding as though before a single agency." MCL 24.203. There was no such case here, as the MAIPF never received notice of any proceeding

September 20 Order, however, was not derived from any contested case and is not a promulgated rule under the Administrative Procedures Act ("APA"). None of the procedures to promulgate a rule under the APA were followed with respect to the September 20 Order. Instead, the September 20 Order seeks to enforce the pronouncement across the insurance industry, as if it is generally applicable to all regulated parties and the MACP and as if it has the force of law. (*Id.*). The September 20 Order requires insurers to resubmit forms and rates to DIFS for approval before the insurers can refer claims to the MACP as a result of the priority change in MCL 500.3114(4) and 500.3115(1). There is no such requirement in either statute.

The September 20 Order specifically references the MACP and states as follows:

> The Assigned Claims Plan shall not provide coverage for claims that have been tendered to it under forms that purport to incorporate amendments made by PA 21 and PA 22 that affect the scope of coverage required to be provided under an insurance policy unless those forms have been approved by the Director.

(*Id.*). Nothing in the statute authorizes the MACP to refuse to provide coverage based on whether DIFS believes it is appropriate to do so. Instead, the MACP's responsibilities are spelled out in the statute. The statute does not contain a provision authorizing the MACP to deny coverage on the basis set forth in the DIFS Order, and the Director cites no such basis in her Order. Thus, the September 20 Order seeks to direct the MACP to not provide coverage as required under the No-Fault Act and, therefore, violate its statutory duties under MCL 500.3171 – 500.3179.

On September 24, 2019, the Director posted a second purported "order" on the DIFS website in the section where orders from contested cases are found (the "September 24 Order"). But, again, the September 24 Order was not derived from any contested case. It is not a

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seeking to adjudicate their rights or duties, there was no hearing, the MAIPF did not participate in any proceeding and were not given the opportunity to present evidence.

promulgated rule under the APA, nor has DIFS contended that it is a rule. While the September 24 Order is aimed specifically at the MAIPF, no underlying contested case existed that would give rise to the order. MAIPF was not on notice of any proceeding purporting to adjudicate its rights and obligations; there was no hearing; MAIPF did not participate in any proceedings; and MAIPF was not provided the opportunity to present evidence. Nonetheless, DIFS seeks to enforce the pronouncement contained in the September 24 Order against MAIPF as if it has the force of law.

The September 24 Order purported to "notify" the MAIPF that "any attempt to rely on the amendments made by PA 21 and PA 22 to cap benefits at $250,000 prior to July 2, 2020, is prohibited" and pronounces that "MAIPF shall not impose a $250,000 cap on MACP benefits under Section 3107c(1)(b) of the Code, pursuant to Section 3172(7)(a), prior to July 2, 2020." (Exhibit 1B). Ironically, DIFS's own website concedes that the Section 3172 was given immediate effect, but then attempts to postpone the effectiveness of only subsection (7) to July 1, 2020. This instruction to disregard and not enforce the statute is a violation of law.

The genesis of the September 24 Order became immediately apparent. The same day, a news article was published regarding the Director's September 24 Order, stating it was the result of Governor Whitmer requesting an "order" delaying the effect of the statutory caps. (Exhibit 1C). The article reports that Governor Whitmer "used her *executive authority* to *amend* the enforcement of the no-fault insurance reform legislation she signed in June." *Id.* (emphasis added). According to the article, Governor Whitmer "promised to use *her powers* to return complete coverage to auto accident survivors" and "promised *to make the chang*e while in a closed-door meeting with advocates opposing the law." *Id.* (emphasis added). The article further provided that "[a]ccording to John Cornack, president of the Eisenhower Center which provides care for those who suffer brain injuries", "the governor's actions were to 'help soften the outcome of the new law' and

postpone its provisions." *Id.* (emphasis added). Mr. Cornack was an attendee at the meeting with the Governor.

ARGUMENT

I. A Temporary Restraining Order Should Be Issued.

Under the Michigan Court Rules, a temporary restraining order may be granted to preserve the status quo pending the hearing on Plaintiff's motion for preliminary injunction. MCR 3.310.

Here, the MAIPF filed a Verified Complaint, demonstrating that if an injunction is not immediately issued, MAIPF will be ordered to violate the law and, as a result, will be subject to litigation by claimants and insurers. (Exhibit 1). Moreover, as explained in the Verified Complaint, the Director has been made aware that any attempt to preclude the MACP from providing benefits in accordance with the cap set forth in MCL 500.3172(7)(a) will cause irreparable harm. Because the requirements of MCR 3.310 have been met, a temporary restraining order preserving the *status quo* until a hearing can be held on this matter should be granted.

II. A Preliminary Injunction Is Appropriate To Preserve The *Status Quo* During the Pendency Of This Litigation.

The Court should enjoin DIFS and its Director from enforcing the purported Orders while the Court considers whether DIFS and its Director exceeded their authority in issuing unilateral statements that attempt to interpret the meaning and applicability of MCL 500.3172(7) and direct the MAIPF to require the MACP to act contrary to the plain language of the relevant statute.

A temporary restraining order or preliminary injunction are "mechanism[s] to maintain the status quo." *Int'l Union, United Auto Aerospace & Agric Implement Workers, Local Union 6000 v State*, 211 Mich App 20, 26; 535 NW2d 210 (1995). Under the traditional standard for injunctive relief, the following factors are considered: (1) the likelihood that the party seeking the injunction will prevail on the merits; (2) the danger that the party seeking the injunction would suffer

irreparable injury if the injunction is not issued; (3) the risk that the party seeking the injunction would be harmed more by the absence of an injunction than the opposing party would be by the granting of the relief; and (4) the harm to the public interest if the injunction is issued. *Freuhauf Trailer Corp v Hagelthorn*, 208 Mich App 447, 449; 528 NW2d 778 (1995).

A. The MAIPF Is Likely To Succeed On The Merits Of This Case.

The purported Orders issued by DIFS and its Director are contrary to law. The Orders seek to amend the No-Fault Act and interpret the Amendments in a manner that conflicts with its plain language. Thus, the Orders violate the Separation of Powers Clause in Michigan's Constitution, as they are attempts to usurp the powers of the Legislative and Judicial branches of government.

1. The Purported Orders Are Not Authorized By Any Authority Granted To DIFS.

DIFS is an administrative agency, and, as such, may only act within the power delegated to it by the Legislature. *Detroit Pub Sch v Conn*, 308 Mich App 234, 242; 863 NW2d 373 (2014) (citations and quotations omitted) ("Administrative agencies have no common-law powers. But the Legislature may confer on an administrative agency the power to enact rules regarding details, to conduct hearings to find facts, and to exercise some discretion in administering a statute."). In short, there are three ways in which an agency may act—under express statutory authority, under its quasi-judicial authority (if so granted), and under its quasi-legislative authority (if so granted).[4] As explained herein, the Orders simply do not fall into any such categories. See *SBC Mich v PSC (In re Complaint of Rovas)*, 482 Mich 90; 754 NW2d 259 (2008).

First, there is no provision of the Insurance Code that grants DIFS the authority to issue "orders"—outside of any notice or hearing process—that contort the plain language of the No-

[4] Administrative agencies may also issue interpretative statements, but here, DIFS has taken the position that the "Orders" are binding. Interpretative statements are clearly not binding and unenforceable. *Danse Corp v City of Madison Hts*, 466 Mich 175, 181; 644 NW2d 721 (2002).

Fault Act and then direct specific parties (here, the MAIPF and the MACP) to prohibit those parties from following the plain language of the relevant statute. The Director cites to no such authority because no such authority exists. For the September 20 Order, the Director cited to no authority for the basis of its "order" directing the MACP not to provide coverage as required under the No-Fault Act. No such authority exists. The Director attempted to cite to such authority in the September 24 Order, but the cited provisions (MCL 500.200, 500.205, and 500.3171(3) and (4)) simply do not grant such authority to the Director.

MCL 500.200 establishes DIFS as a department charged with the execution of the laws related to insurance and surety business in the State. This provision grants no special authority to DIFS to issue the Orders. In fact, the Orders attempt not to execute the laws related to insurance but rather to amend or alter such laws. MCL 500.205 states that, "[o]rders, decisions, findings, rulings, determinations, opinions, actions, and inactions of the commissioner in this act shall be made or reached in the reasonable exercise of discretion." Again, this provision does not grant DIFS any special authority—moreover, this provision specifically refers to orders "in this act", meaning such orders as otherwise provided for in the Insurance Code. It is not an independent source of authority for the Director. Finally, MCL 500.3171(3) and (4) also do not grant DIFS or the Director authority to issue the Orders. Section 3171(3) provides that the Director may review the assigned claims plan and may approve it. The plan takes effect on such approval. The Director approved the plan years ago. That provision provides no authority to issue orders. The same is true for Section 3171(4), which relates to approval of amendments to the plan—which is not at issue here.

Second, the Orders also are not within the agency's quasi-judicial powers. "Administrative agencies exercise what have been described as 'quasi-judicial' powers in the sense that they may

review contested cases and issue orders, but this power is not an exercise of constitutional 'judicial power.'" See *AG v Blue Cross Blue Shield*, 291 Mich App 64, 90; 810 NW2d 603 (2010). "Since the time of *Marbury v Madison*, interpreting the law has been one of the defining aspects of judicial power. 'Although [courts] may not usurp the lawmaking function of the legislature, the proper construction of a statute is a judicial function, and [courts] are required to discover the legislative intent.'" *In re Complaint of Rovas*, 482 Mich 90, 98; 754 NW2d 259 (2008). Thus, while courts have stated that administrative agencies have the power to interpret the statutes that they enforce, those interpretations do not have the force of law like a court's judicial opinion interpreting a statute. *Id.* Moreover, pursuant to separation of powers principles, "[a]n administrative agency's interpretation of a statute that it is obligated to execute is entitled to 'respectful consideration,' but it 'cannot conflict with the plain meaning of the statute." *Hegadorn v Dep't of Human Servs Dir*, 503 Mich 231, 244; 931 NW2d 571 (2019) (citing *In re Rovas Complaint*, 482 Mich at 108). Agency interpretations do not have the force of law and, thus, are not enforceable. *Danse Corp*, 466 Mich at 181.

Instead, the cases that administrative agencies conduct under their "quasi judicial" power are essentially "administrative fact-finding exercises." *Blue Cross Blue Shield*, 291 Mich App at 90; see also *In re Complaint of Rovas*, 482 Mich at 101.(agencies' quasi-judicial function is to serve as a fact finder in contested cases). "'Contested case' means a proceeding, including rate-making, price-fixing, and licensing, in which a determination of the legal rights, duties, or privileges of ***a named party*** is required by law to be made by an agency after an opportunity for an ***evidentiary hearing***." MCL 24.203 (emphasis added).

Here, it is indisputable that the Director's Orders are not the result of a contested case involving a ***named party*** and did not resolve any evidentiary record. While the Director claims

she had the authority to issue the September 24 Order, as explained above, none of those statutes give DIFS carte blanche authority to unilaterally issue binding judicial interpretations of law. DIFS's authority to act is entirely contained by the authority delegated by the Legislature. *Detroit Pub Sch*, 308 Mich App at 242. It is axiomatic that the Legislature does not have the power reserved to the Judicial branch to interpret statutes outside of any statutory authority related to an agency's interpretation. See *In re Rovas Complaint*, 482 Mich at 98-99.

Simply put, DIFS does not have the power to invalidate any statute or portion thereof through a "quasi-judicial" order and the Orders are not the result of any resolution in a contested case. Thus, the Orders are not an exercise of the agency's "quasi-judicial" power. Any such position taken by DIFS or its Director is plainly invalid under the Michigan Constitution's Separation of Powers Clause. Const 1963, art 3, § 2.

Third, the Orders are also not within DIFS's quasi-legislative authority. DIFS "has the authority to 'promulgate rules and regulations' to 'effectuate the purposes' of the Insurance Code and to 'execute and enforce' its provisions." *Ins Institute v Commissioner*, 486 Mich 370, 389; 785 NW2d 67 (2010) (quoting MCL 500.210). But, this quasi-legislative authority is not unfettered. These agencies **cannot exercise legislative power by creating law or changing the laws enacted by the Legislature.** *Blue Cross Blue Shield*, 291 Mich App at 89. In other words, rules promulgated by an agency cannot conflict with any statute. "An administrative rule is 'an agency regulation, statement, standard, policy, ruling, or instruction of general applicability that implements or applies law enforced or administered by the agency . . . .'"[5] *Ass'n of Bus Advocating*

[5] Here, the Director's September 24 Order is not generally applicable and is directed only at the MAIPF. While much of the September 20 Order is directed across the insurance industry generally, it also provides a specific provision directed only at the MACP, ordering it not to provide coverage, in contravention of the No-Fault Act. As discussed above, the Director has no authority to unilaterally "order" the MAIPF or MACP to act in contravention of the law.

Tariff Equity v Mich Pub Serv Comm'n (In re Reliability Elec Utils for 2017-2021), 325 Mich App 207, 232; 926 NW2d 584 (2018) (citing MCL 24.207).

While agency rules have the force of law, in order to promulgate a rule, APA procedures must be followed. *Detroit Edison Co v Dep't of Treasury*, 498 Mich 28, 45; 869 NW2d 810 (2015) (finding that, for an agency regulation of general applicability to have the force of law, it must fall under the definition of a properly promulgated rule). MCL 24.241(1) provides, in pertinent part: "[B]efore the adoption of a rule, an agency, or the office of regulatory reform, shall give notice of a public hearing and offer a person an opportunity to present data, views, questions, and arguments." *Mich Ass'n of Home Builders*, 481 Mich at 499.

Here, the Orders are not the result of any procedure under the APA, or otherwise, promulgating a rule. Nor has DIFS or its Director contended the Orders are a rule. Thus, the Orders are not the proper exercise of DIFS' "quasi-legislative" power and, thus, do not have the force of law.

With no basis for DIFS or the Director to issue these purportedly binding "orders" against, in part, specific entities directing those entities to violate the No-Fault Act, the Orders are unsupported by the force of law.

2. The Orders Are Unconstitutional Attempts To Usurp The Power Of The Legislature.

Beyond lacking the authority to unilaterally issue binding directives, even if DIFS had some authority to issue such "orders", it certainly does not have the authority to use such "orders" to amend legislation with which it disagrees. DIFS does not have the authority to amend the No-Fault Act and delay the effective date of the statutory caps put in place by the Legislature, which took immediate effect on June 11, 2019. Michigan's Constitution provides that: "The powers of government are divided into three branches: legislative, executive and judicial. No person

exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution." Const 1963, art 3, § 2. "'The legislative power of the State of Michigan is vested in a senate and a house of representatives.' Simply put, legislative power is the power to make laws." *In re Complaint of Rovas*, 482 Mich at 98 (quoting Const 1963, art 4, § 1). It is undeniable that an administrative agency cannot override the Legislature's clear directives set forth in its statutory provisions. *Id.* DIFS is charged only with administering and enforcing the Insurance Code and does not have the power to rewrite it, which is exactly what it purports to do with its Orders.

The Legislature passed Public Acts 21 and 22 by a two-thirds majority vote, and when it was signed into law by Governor Whitmer on June 11, 2019, they became immediately effective. Const 1963, art 4, § 27. The amendments to the No-Fault Act included MCL 500.3172(7), which concerns claims handled by the MACP. It states as follows:

> The Michigan automobile insurance placement facility and the insurer to whom a claim is assigned by the Michigan automobile insurance placement facility are only required to provide personal protection insurance benefits under section 3107(1)(a) up to whichever of the following is applicable:
>
> (a) Unless subdivision (b) applies, the limit provided in section 3107c(1)(b).
>
> (b) If the person is entitled to claim benefits under the assigned claims plan under section 3107d(6)(c) or 3109a(2)(d)(ii), $2,000,000.00.

MCL 500.3172(7). Thus, under subsection (a), unless subsection (b) applies, the limit of $250,000 applies to claims assigned to the MACP.[6] The limit referred to in MCL 500.3172(7)(b) is $2,000,000 and applies where a person is entitled to benefits under the assigned claims plan under

[6] The limit referred to in MCL 500.3172(7)(a) is $250,000. See MCL 500.3107c(1)(b).

MCL 500.3107d(6)(c) or MCL 500.3109a(2)(d)(ii). However, both MCL 500.3107d(6)(c) and MCL 500.3109a(2)(d)(ii) do not become effective until July 2, 2020, pursuant to the plain language of those provisions. Therefore, until July 2, 2020, only the $250,000 limit under MCL 500.3172(7)(a) applies for purposes of MCL 500.3172(7).

However, according to DIFS's September 24 Order, MCL 500.3172(7)(a) also should not be effective until July 2, 2020.[7] This is in direct contravention to the plain language of MCL 500.3172(7)(a).[8] "The principal goal of statutory interpretation is to give effect to the Legislature's intent, and the most reliable evidence of that intent is the plain language of the statute." *Hegadorn*, 503 Mich at 245 (citing *South Dearborn Environmental Improvement Ass'n, Inc v Dep't of Environmental Quality*, 502 Mich 349, 360-361; 917 NW2d 603 (2018)). The Legislature can, and did, expressly provide for delayed effective dates in certain provisions. See MCL 500.3106a and 500.3107d. Thus, if the Legislature wanted MCL 500.3172(7)(a) not to become effective until July 2, 2020, it simply would have stated so. It is not within DIFS's authority, or even the authority of the Courts, to simply insert a provision into MCL 500.3172(7)(a) on the assumption that the Legislature simply forgot to add it. *See Hegadorn*, 503 Mich at 261 (quoting *Farrington v Total*

[7] DIFS argues that a reading of the statute's plain language renders MCL 500.3172(b) meaningless unless subsection (a)'s effective date is also July 2, 2020. The September 24 Order argues that, while not stated as it is in other sections of the amended Act, subsection (a) should not be effective until July 2, 2020 because subsection (b) is not implicated until July 2, 2020. This reading of the statute is erroneous. First, the statute expressly envisioned this possibility: it provides that subsection (a) applies only if subsection (b) does not, and then provides for a different limit for when subsection (b) will apply in the future. If DIFS's interpretation were correct, the the language specifying which subsection applies based on the type of claim at issue would be surplusage. Further, a reading of the statute as a whole yields no surplus language or contradictions. Just because subsection (b) is not implicated until July 2, 2020 does not make it surplusage. The statute is unambiguous. See *Lynch v Lyng*, 872 F2d 718, 723 (CA 6, 1989) (Secretary of Agriculture was bound to honor statutorily-set effective dates, which were not surplus language in the statute).

[8] "An administrative agency's interpretation of a statute that it is obligated to execute is entitled to 'respectful consideration,' but it 'cannot conflict with the plain meaning of the statute.'" *Hegadorn*, 503 Mich at 244 (quoting *In re Rovas Complaint*, 482 Mich at 108).

Petroleum, Inc, 442 Mich 201, 210; 501 NW2d 76 (1993) ("Courts cannot assume that the Legislature inadvertently omitted from one statute the language that it placed in another statute, and then, on the basis of that assumption, apply what is not there."). To do so would be to legislate, which is an unconstitutional usurping of legislative power.[9]

Neither the Governor nor DIFS has the power to retroactively amend legislation passed by the Legislature and signed into law. The Constitution expressly sets forth the procedures for the amendment of legislation. Const 1963, art 4, § 25. The exercise of the legislative power of amendment by the executive violates the provisions of the Michigan Constitution that establish the procedure for enacting and amending legislation, as well as the Separation of Powers Clause.

Neither DIFS nor its Director have the authority to ban conduct that is in conformity with the plain language of the Insurance Code. Any such attempt exceeds the power delegated to DIFS by the Legislature. *See Ins Institute v Commissioner*, 486 Mich at 407. Simply put, by attempting to rewrite the amendments to the No-Fault Act, the Director is usurping the Legislature's power in violation of section 2 of article 3 of the Michigan Constitution of 1963. The Orders are not valid or enforceable.

3. The Orders Demand Plaintiff Violate the Law.

DIFS's orders direct the MACP to violate the law in two separate ways. The first Order requires the MACP to ignore the change in the priority provisions enacted by the Legislature unless an insurer has first gone through additional hoops mandated by the Director. Yet the Legislature mandated that the MACP provide No-Fault insurance benefits under specified circumstances. MCL 500.3172(1); 500.3114; 500.3115. The MACP is tasked only with making the initial

[9] As noted *supra*, the Governor instructed the Director to issue the second Order, recognizing that it was a postponement not included in the Amendments, and without the use of an Executive Order.

determination of eligibility of a claim and may only deny a claim if it is "obviously ineligible." MCL 500.3173a(1). Eligibility is determined only by the conditions outlined in MCL 500.3172(1) and any attempt to deny coverage for any other reason is outside the scope of power granted to the MAIPF and MACP. *Spectrum Health Hosps v Mich Assigned Claims Plan*, an unpublished opinion of the Court of Appeals, issued Sept 24, 2019 (Docket No. 343563) (Exhibit 2). Thus, Plaintiff has no authority to deny coverage on any other basis. *Id.* Even DIFS, on its own website, concedes that MCL 500.3114's priority change is given immediate effect.[10]

The second Order demands the MAIPF ignore the $250,000 statutory cap on benefits on claims under MCL 500.3172(7)(a). As already discussed, this is in direct contravention of the law and DIFS has no authority to make such a directive. Neither DIFS nor the MACP can postpone the effective date of the cap.

In sum, the MAIPF and MACP have a strong likelihood of success on the merits because DIFS' and its Director's actions are not grounded in any law or authority granted to them, their purported Orders are an unconstitutional attempt at usurping the Legislature's power, and Defendants have no authority to demand the MAIPF and MACP violate the law.

B. Plaintiff Will Be Irreparably Harmed If Defendants Are Not Enjoined From Enforcing The Purported Orders.

The Orders have placed the MAIPF and MACP in an untenable situation because the Orders direct that the MAIPF require the MACP to violate the law and threaten enforcement action if Plaintiff fails to comply with the Orders. This constitutes irreparable injury under the law. See

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[10] DIFS's website states: (https://www.michigan.gov/difs/0,5269,7-303-13047_13049_34631_95382---,00.html)

1. Do the order of priority changes in Section 3114 have immediate effect? Yes; however, filings must be submitted prior to changing claims practices. See DIFS Order 19-048-M.

e.g., *Sherfel v Gassman*, 899 F Supp 2d 676, 710 (SD Ohio, 2012) *aff'd* 768 F3d 561 (CA 6, 2014) (plaintiffs established irreparable harm where the continued enforcement of a state law by an agency, requiring them to pay benefits, would place them in the untenable position of choosing to either violate state or federal law).

If the MACP returns claims to the insurers who have shifted the claims based on the statutory priority change, they risk lawsuits by those insurers. The Orders do not allow the MACP to process the claims according to the No-Fault Act's requirements in MCL 500.3172 and 500.3173a, which require the MACP to timely and promptly send claims that it receives for a determination as to whether coverage exists on the claim and, if so, to process the claims accordingly. The practical effect of the September 20 Order is that the MACP will move claims from the MACP's servicing insurance carriers back to the insurance companies until the Director decides it is appropriate for those insurers to send the claims to the MACP, notwithstanding that the MACP has no statutory authority to do so.

Further, if the Director is not enjoined from enforcing its Orders, the MACP will be required to pay amounts in excess of the $250,000 cap until such time as the litigation resolves or face enforcement action from DIFS. Some of the claims submitted to the MACP are catastrophic claims where the MACP expects that the cap will be exceeded. Once the MACP pays the patients and providers on those claims, there is no effective way for it to recoup the funds paid out. Even if the MACP is able to obtain partial repayment from some hospitals, it is doubtful that any of the individuals will be able to repay the sums to the MACP. This also constitutes irreparable harm. *Mich Consol Gas Co v Mich Pub Serv Com*, 389 Mich 624, 643; 209 NW2d 210 (1973) (unrecoverable financial losses constitute irreparable harm).

It is easy to issue an Order that is neither fish nor fowl and let others deal with the consequences. In this case, those consequences expose the MAIPF to irreparable harm.

C. Neither DIFS Nor Its Director Can Be Harmed By An Injunction Preserving the *Status Quo*.

This factor requires the Court to balance the harm that will flow to either party if this motion is granted. This factor weighs strongly in favor of the MAIPF who will be irreparably harmed. The Director and DIFS, however, would not all be harmed by an injunction because they would suffer only the inability to amend provisions of the No-Fault Act with which they disagree. This is not a harm—at most, it is an inconvenience, as if they wish to delay the statutory caps, they must do so through lawful means (addressing the Legislature). Moreover, the Director and DIFS cannot be harmed by an injunction staying enforcement of the Orders because they had no right to issue them in the first place and the contents of the Orders are unconstitutional. An injunction staying enforcement merely preserves the *status quo* as of June 11, 2019, and requires application of the No-Fault Act according to its terms as set forth by the Legislature. On balance, all of the perceivable harm would be suffered by the MAIPF, not DIFS or its Director.

D. The Public Interest Weighs In Favor Of An Injunction.

Doubtless the DIFS and its Director will make much of this factor, claiming that it is crucial to the public interest to prevent statutory caps from robbing claimants of benefits but, such an argument is short-sighted. As an initial matter, it is DIFS and its Director that has ordered the MACP not to provide benefits to certain claimants and the practical effect of its orders would prevent numerous claimants from receiving benefits until certain forms were able to be approved through agency procedures. (Exhibit 1A). Illegally delaying such benefits undermines the very purposes of the No-Fault Act to provide fast payment for economic losses, specifically, medical

bills, wage loss, and replacement services. *Shavers v Attorney General*, 402 Mich 554, 622; 267 NW2d 72 (1978).

Moreover, those claimants who would receive benefits to which they are not entitled would, most likely to their great surprise, become liable for repayment once the Orders are declared unconstitutional. Forcing the MACP to provide benefits, which are not in conformity with the law, and subsequently seek repayment from claimants for the same, is not a scheme that is in the interest of the claimants that DIFS and its Director seeks to protect. Moreover, because the MAIPF is funded by assessments which are paid by the insurers authorized to transact business in Michigan, who in turn pass them on to the driving public through increased premiums, the driving public does not benefit from the delayed implementation of the cap.

Finally, the power to legislate for the welfare of the people is a matter of public concern and that power is assigned to the Legislature – not DIFS. Const 1963, art 4, § 51. In this case, the Legislature has declared it to be in the best interest of the public to impose statutory caps immediately on claims submitted to the MACP, which was the Legislature's decision to make. MCL 500.3172(7). Without an injunction staying enforcement of the Orders, Michigan's constitutional structure of government would be left disturbed, which is not in the public's best interest.

CONCLUSION

For the foregoing reasons, the Court should GRANT Plaintiff's motion, ISSUE a temporary restraining order enjoining the enforcement of the Orders, and issue an Order to Show Cause why the Court should not preliminarily enjoin Defendants, and award such additional relief as may be appropriate.

Respectfully submitted,

DYKEMA GOSSETT PLLC

Date: October 14, 2019

By: Lori McAllister

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Tab 1

STATE OF MICHIGAN

IN THE COURT OF CLAIMS

Michigan Automobile Insurance Placement Facility, in its capacity as the administrator of the Michigan Assigned Claims Plan,

Plaintiff,

vs.

Department of Insurance and Financial Services and Anita G. Fox in her official capacity as the Director of the Department of Insurance and Financial Services,

Defendant.

Civil Action No. -MM

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There is no other pending or resolved civil action arising out of the transaction or occurrence alleged in the complaint.

VERIFIED COMPLAINT FOR INJUNCTIVE RELIEF AND DECLARATORY RULING

SUMMARY

Plaintiff, the Michigan Automobile Insurance Placement Facility ("MAIPF"), in its capacity as the administrator of the Michigan Assigned Claims Plan ("MACP") requests that this Court issue a temporary restraining order and, after a hearing, a preliminary injunction enjoining Defendants, the Department of Insurance and Financial Services ("DIFS") and its Director, Anita G. Fox ("Director"), from instituting any action to enforce their two pronouncements, purported to be "orders", issued on September 20, 2019 and September 24, 2019 (the "Orders") against the

MAIPF or MACP. The purported "orders" are not properly promulgated rules nor orders issued in any contested case in which the MAIPF or MACP was a party. Of particular concern, the Director purports to order the MACP to act contrary to law by (1) refusing to process claims that it receives as required by MCL 500.3172, and (2) prohibiting the MACP from complying with the statutory cap on benefits that is applicable to claims against the MACP filed June 11, 2019 and later. In so ruling, the Director vastly surpassed her regulatory authority and attempted to act in a quasi-legislative role that is prohibited by law.

If DIFS is not enjoined from enforcing its Orders, the MACP, and the MAIPF as the administrator of the MACP, will suffer irreparable harm as they will be exposed to litigation from claimants entitled to benefits and insurers to which the claims are returned. The MACP will also suffer financial losses that will not be recoverable. As demonstrated in the attached Motion and Brief, the MAIPF has a substantial likelihood of success on the merits, the MAIPF and the MACP will be irreparably harmed if enforcement of the Orders is not enjoined, DIFS and its Director face no potential harm from an injunction enjoining enforcement of the Orders, and it is in the interest of the public to stay the Orders.

In support of its Complaint, the MAIPF states as follows:

PARTIES AND JURISDICTION

1. The MAIPF is a statutorily created organization, see MCL 500.3301 *et seq*, primarily responsible for ensuring that automobile insurance coverage is available to any person that is otherwise unable to procure that insurance through ordinary methods. The MAIPF is directed by its Board of Governors ("Board"), as provided in MCL 500.3330. The Michigan Legislature also tasked the MAIPF with adopting and implementing an Assigned Claims Plan (the MACP). See MCL 500.3171–500.3178. The MAIPF and the MACP are funded by statutorily

required assessments under the No-Fault Act which, in turn, are passed on to the driving public. The MAIPF's principal office is located at 17456 N Laurel Park Dr # 130E, Livonia, MI 48152.

2. The MACP, formerly known as the Assigned Claims Facility ("ACF"), was established by the Legislature in 1973 to provide assistance to people injured in an accident involving a motor vehicle when there was no automobile insurance available. MCL 500.3171. The Secretary of State managed the program until December 17, 2012, when the MAIPF was given the task of operating the MACP. The MACP, as a last resort, is responsible for personal injury protection ("PIP") benefits to those no-fault claimants who are injured in an automobile accident when there is no insurance company responsible for the payment of no-fault benefits under the statutory scheme established by Michigan's No-Fault Act. The MACP's principal office is located at 17456 N Laurel Park Dr # 130E, Livonia, MI 48152.

3. Defendant DIFS is a State of Michigan agency created by Executive Order 2013-1.[1] DIFS is an executive agency charged with the responsibility and authority to administer and implement, *inter alia*, the Michigan Insurance Code of 1956, MCL 500.100 *et seq.* DIFS's principal office is located at 530 W Allegan St #7, Lansing, MI 48933.

4. Anita G. Fox is the Director of DIFS. She was appointed Director of the Department of Insurance and Financial Services (DIFS) by Michigan Governor Gretchen Whitmer effective January 14, 2019, and is named in her representative capacity only.

5. This Court has subject-matter jurisdiction over this Complaint pursuant to MCL 600.6419 and has the authority to grant injunctive relief pursuant to MCR 3.310. Because the

[1] DIFS is the successor to the Office of Financial and Insurance Regulation, which was preceded by the Office of Financial and Insurance Services, which was synthesized from the Insurance Bureau Financial Institutions Bureau and the securities functions of the former Corporation, Securities, and Land Development Bureau.

Director has purported to exercise a quasi-legislative function with her Orders, an appeal under the Administrative Procedures Act is not appropriate, and this Court has exclusive jurisdiction. Furthermore, any remand or referral of this matter to DIFS would be futile given that DIFS and the Director have plainly expressed their view of the law in the Orders.

FACTUAL BACKGROUND

6. On June 11, 2019, Public Acts 21 and 22 were signed into law by Governor Gretchen Whitmer. These Public Acts amended Michigan's No-Fault Act, MCL 500.3100 *et seq.* and other related statutes. As part of the amendments to the Act, the following language was added to MCL 500.3172:

> The Michigan automobile insurance placement facility and the insurer to whom a claim is assigned by the Michigan automobile insurance placement facility are only required to provide personal protection insurance benefits under section 3107(1)(a) up to whichever of the following is applicable:
>
> (a) Unless subdivision (b) applies, the limit provided in section 3107c(1)(b).
>
> (b) If the person is entitled to claim benefits under the assigned claims plan under section 3107d(6)(c) or 3109a(2)(d)(ii), $2,000,000.00.

MCL 500.3172(7). Public Acts 21 and 22 were given immediate effect, except as specifically provided by the Legislature within certain statutory provisions.

7. The limit referred to in MCL 500.3172(7)(a) is $250,000. See MCL 500.3107c(1)(b).

8. The limit referred to in MCL 500.3172(7)(b) is $2,000,000 and applies where a person is entitled to benefits under the assigned claims plan under MCL 500.3107d(6)(c) or MCL 500.3109a(2)(d)(ii). However, both MCL 500.3107d(6)(c) and MCL 500.3109a(2)(d)(ii) will not become effective until July 1, 2020, pursuant to the plain language of those provisions.

9. Therefore, until July 2, 2020, the $250,000 limit under MCL 500.3172(7)(a) governs the payment of PIP benefits by the MACP for purposes of MCL 500.3172(7).

10. In addition to placing a limit or cap of $250,000 on claims submitted to the MACP, the Legislature also amended the statutory priority of claims when an accident involves an occupant/passenger or someone not in a vehicle such as a pedestrian. In particular, prior to the Amendments, Section 3114 of the No-Fault Act required an occupant in a vehicle who was injured in an automobile accident, and not otherwise insured, to seek benefits first from the owner of the vehicle, and second from the operator of the vehicle. The same priority scheme governed a situation where a pedestrian was the injured person pursuant to MCL 500.3115. Under the Amendments, a person who suffers accidental bodily injury arising from a motor vehicle accident while an occupant of a motor vehicle who is not covered under their own PIP policy shall now claim PIP benefits from the MACP. MCL 500.3114(4). A person who suffers accidental bodily injury while not an occupant of a motor vehicle (such as a pedestrian) who is not covered under the own PIP policy shall now claim PIP benefits from the MACP. MCL 500.3115(1).

11. Following the Amendments, the MACP has received two types of claims. The first type are claims made directly to the MACP when there is no insurance available for the accident, which is the traditional type of claim made to the MACP. The second type of claims results from the changed priority scheme enacted by the Legislature which makes the MACP responsible for claims by occupants and pedestrians who are not covered under their own PIP policy. Both types of claims are subject to the cap of $250,000, rather than unlimited benefits. MCL 500.3172(7)(a).

12. Once the MACP receives a claim, it is required to make an initial determination of whether the claim is an "eligible" claim because there is no other applicable insurance. If the MACP determines that the claim is eligible for assignment, it assigns the claim to a servicing

insurance company for handling. The servicing insurer or the MACP can request reasonable proof of loss from the claimant, including an examination under oath if appropriate. *See* generally, MCL 500.3173a.

13. The MACP began receiving claims pursuant to the Amendments the day after they became effective on June 11, 2019. Numerous insurers referred claims to the MACP because of the change in the priority scheme enacted by the Legislature. Because it is necessary to confirm that the referring insurer's policy does not provide coverage independent of the statutory change, a number of referrals were made to outside counsel to evaluate the referring insurers' policies to determine if there was coverage, which would make the claim ineligible for MACP coverage.

14. Three months after the entire system shifted as a result of the Amendments becoming effective, DIFS for the first time questioned whether the Amendments were effective upon enactment. The MAIPF provided its legal analysis demonstrating that the Amendments became effective upon enactment, requiring it to consider claims being presented by the referring insurers, among other things.

15. On September 20, 2019, the Director issued what DIFS described as an "order" (the "September 20 Order") (Exhibit A) and posted it on the DIFS website in the same place it places its orders in contested cases. The September 20 Order, however, was not derived from any "contested case."[2] Nor was it a promulgated rule under the Administrative Procedures Act ("APA"), and DIFS has not contended that it is a rule. None of the procedures to promulgate a

[2] "'Contested case' means a proceeding, including rate-making, price-fixing, and licensing, in which a determination of the legal rights, duties, or privileges of a named party is required by law to be made by an agency after an opportunity for an evidentiary hearing. When a hearing is held before an agency and an appeal from its decision is taken to another agency, the hearing and the appeal are considered a continuous proceeding as though before a single agency." MCL 24.203.

rule under the APA were followed with respect to the September 20 Order. Instead, the September 20 Order seeks to enforce the pronouncement made across the insurance industry, as if it is generally applicable to all regulated parties and the MACP, and as if it has the force of law. It does not.

16. The September 20 Order requires insurers to resubmit forms and rates to DIFS for approval before the insurers could refer claims to the MACP as a result of the priority change in MCL 500.3114(4) and 500.3115(1). There is no such requirement in either statute.

17. With respect to the MACP, the Director ordered that:

> The Assigned Claims Plan shall not provide coverage for claims that have been tendered to it under forms that purport to incorporate amendments made by PA 21 and PA 22 that affect the scope of coverage required to be provided under an insurance policy unless those forms have been approved by the Director.

Ex. A, ¶4.

18. Nothing in the statute authorizes the MACP to refuse to provide coverage based on whether DIFS believes it is appropriate to do so. Instead, the MACP's responsibilities are spelled out in the statute. The statute does not contain a provision authorizing the MACP to deny coverage on the basis set forth in the DIFS Order, and the Director cites no such basis in her Order. Thus, the September 20 Order seeks to direct the MACP to not provide coverage as required under the No-Fault Act and, therefore, violate its statutory duties under MCL 500.3171 – 500.3179.

19. On September 24, 2019, the Director posted a second purported "order" on the DIFS website in the section where orders from contested cases are found (the "September 24 Order") (together with the September 20 Order, the "Orders"). But, again, the September 24 Order was not derived from any contested case. While the September 24 Order is aimed at the MAIPF, no underlying hearing was held, MAIPF had no notice of any proceeding purporting to adjudicate its rights, MAIPF did not participate in any proceedings, and MAIPF was not provided the

opportunity to present evidence. It is not a promulgated rule under the APA, nor has DIFS contended that it is a rule. None of the procedures to promulgate a rule under the APA were followed with respect to the September 24 Order. Again, DIFS seeks to enforce the pronouncement contained in the September 24 Order against MAIPF, as if it has the force of law. It does not.

20. The September 24 Order purported to "notify" the MAIPF that "any attempt to rely on the amendments made by PA 21 and PA 22 to cap benefits at $250,000 prior to July 2, 2020, is prohibited" based on the Director's alleged interpretation of MCL 500.3172(7). (Exhibit B). The September 24 Order included an erroneous legal analysis to reach its conclusions that implementing the $250,000 cap on MACP benefits prior to July 2, 2020 would conflict with the purpose of the Insurance Code to protect policyholders, creditors and the public; is not supported by principles of statutory interpretation; and frustrates the intent of other statutory amendments contained in the Insurance Code.

21. The September 24 Order pronounces that "MAIPF shall not impose a $250,000 cap on MACP benefits under Section 3107c(1)(b) of the Code, pursuant to Section 3172(7)(a), prior to July 2, 2020." (*Id.*) This instruction to disregard and not enforce the statute, which makes the cap applicable immediately, is a violation of law.

22. The source of the September 24 Order became immediately apparent. On the same day, a news article was published regarding the September 24 Order, reporting that the Director issued the September 24 Order at the request of Governor Gretchen Whitmer who "used her ***executive authority*** to ***amend*** the enforcement of the no-fault insurance reform legislation she signed in June." (Exhibit C) (emphasis added). According to the article, Governor Whitmer "promised to use ***her powers*** to return complete coverage to auto accident survivors" and "promised ***to make the change*** while in a closed-door meeting with advocates opposing the law."

Id. (emphasis added). The article further provided that "[a]ccording to John Cornack, president of the Eisenhower Center which provides care for those who suffer brain injuries", "the governor's actions were to 'help soften the outcome of the new law' and ***postpone its provisions***." *Id.* (emphasis added). Mr. Cornack was an attendee at the meeting with the Governor. No Executive Order was ever issued.

23. Neither DIFS nor the Director are empowered to postpone the implementation of part of the Amendments for political reasons. While the Director is a member of the Executive Branch, there is nothing in the Michigan Constitution or Michigan law that permits the Governor to legislate from her office by ordering the Director of DIFS to issue orders changing the effective date of the Amendments.

24. DIFS contends it has the power to issue the September 24 Order under MCL 500.205, MCL 500.3171, and its general power to execute the laws in the insurance code under MCL 500.200. But nothing in those statutes allows DIFS to usurp the power of the Legislature to amend statutory law or the power of the judiciary to invalidate laws passed by the Legislature. DIFS's authority to issue orders using its reasonable discretion must be within the authority delegated to it by the Legislature. *Detroit Pub Sch v Conn*, 308 Mich App 234, 242; 863 NW2d 373 (2014) (citations and quotations omitted) ("Administrative agencies have no common-law powers. But the Legislature may confer on an administrative agency the power to enact rules regarding details, to conduct hearings to find facts, and to exercise some discretion in administering a statute."). The Legislature has not, and cannot, delegate the power to legislate to DIFS, and has not given DIFS the authority to determine which claims are or are not covered by the MACP, or when a statute becomes effective. See *Taylor v Smithkline Beecham Corp*, 468

Mich 1, 8; 658 NW2d 127 (2003) (while the Legislature may obtain assistance from the judicial and executive branches, it may not delegate the power to legislate to either).

25. DIFS's orders direct the MACP to violate the law because the purported Orders preclude the MACP from providing coverage for claims that it may determine are valid, and imposes restrictions not in the statute before coverage may be afforded by the MACP. The practical effect of the September 20 Order is that the MACP either returns claims from the servicing insurance carriers to whom they are assigned to the insurers from which they originated or risk administrative attempts to enforce the Order. Moreover, the Order does not allow the MAIPF or MACP to process the claims according to the No-Fault Act's requirements in MCL 500.3172 and 500.3173a, which require the MACP to timely and promptly send claims that it receives for a determination as to whether coverage exists on the claim and, if so, to process the claims accordingly.

26. Forcing the MAIPF and MACP to violate the law is an irreparable injury that exposes them to litigation from both the insurers to whom the MACP returns the files and from the underlying claimants who do not have their claims timely processed.

27. Enforcement of the prohibition against implementing the $250,000 cap also irreparably harms the MACP as it will be required to pay amounts in excess of the $250,000 cap until such time as the litigation resolves or face enforcement action from DIFS. Some of the claims submitted to the MACP are catastrophic claims where the MACP expects that the cap will be exceeded. Once the MACP pays the patients and providers on those claims, there is no effective way for it to recoup the funds paid out. Even if the MAIPF is able to obtain partial repayment from some hospitals, it is doubtful that any of the individuals will be able to repay the sums. Given that the Director of DIFS is ordering the MACP to pay unlimited benefits, the amounts paid could

greatly exceed the cap and will be forever unrecoverable. These costs are ultimately passed on to auto insurance companies by way of assessments, who in turn pass the costs on to the driving public.

28. Neither the Governor, DIFS, a state agency, nor the Director have the authority to postpone the effectiveness of the statutory cap, to pronounce the unambiguous plain language of a statute to be ineffective, or to effectively amend a statute. Moreover, neither the Governor, DIFS, nor the Director have the authority to demand that MAIPF or MACP violate the law by refusing to perform their statutory obligations.

COUNT I—DECLARATORY RELIEF

29. The MAIPF hereby realleges and incorporates the foregoing paragraphs as though fully set forth herein.

30. DIFS issued two purported Orders that do not have the force of law because they are not derived from any law or authority granted to DIFS. The Orders seek to amend legislation passed by delaying the caps on benefits provisions from coming into effect immediately. DIFS does not have the authority to override choices made by the Legislature. An administrative agency, such as DIFS, "cannot exercise legislative power by creating law or changing the laws enacted by the Legislature." *SBC Mich v PSC (In re Complaint of Rovas)*, 482 Mich 90, 98; 754 NW2d 259 (2008). Therefore, by attempting to rewrite the amendments to the No-Fault Act, the Director is usurping the Legislature's power in violation of section 2 of article 3 of the Michigan Constitution of 1963. Const 1963, art 3, § 2. In short, DIFS exceeded its authority when it issued the purported Orders for at least the following reasons:

a. The Director's purported Orders violate the Michigan Constitution's separation of powers principles. While an administrative agency has "quasi-legislative" powers,

such powers are limited to rule making. *In re Complaint of Rovas*, 482 Mich at 98. An administrative agency, such as DIFS, "cannot exercise legislative power by creating law or changing the laws enacted by the Legislature." *Id.* Thus, DIFS cannot promulgate any rule that conflicts with a statute because only the Legislature may make law. See *id.* By attempting to rewrite the amendments to the No-Fault Act, the Director is usurping the Legislature's power in violation of section 2 of article 3 of the Michigan Constitution of 1963. Const 1963, art 3, § 2.

b. Because the Director's Orders are not the result of contested cases, they are not derived from administrative agencies' "quasi-judicial" power. "Administrative agencies exercise what have been described as 'quasi-judicial' powers. However, such power is limited and is not an exercise of constitutional 'judicial power.' The primary 'judicial' function exercised by administrative agencies is confined to conducting contested cases." *In re Complaint of Rovas*, 482 Mich at 98-99. Thus, DIFS has no authority to issue a rule of law by issuing a purported judicial opinion. DIFS's power to adjudicate cases is limited to a fact-finding exercise in contested cases. *Id.* at 98.

c. The Orders do not have the force of law because agencies do not have the power to unilaterally issue pronouncements that have the force of law. *Ass'n of Bus. Advocating Tariff Equity v. Mich. Pub. Serv. Comm'n (In re Reliability Elec. Utils. for 2017-2021)*, 325 Mich App 207, 232-233, 926 NW2d 584 (2018) (quoting *Faircloth v Family Independence Agency*, 232 Mich App 391, 403-404; 591 NW2d 314 (1999) ("An agency should resort to formal APA rulemaking when establishing policies that 'do not merely interpret or explain the statute or [rules from which the

agency derives its authority,' but rather 'establish the substantive standards implementing the program.'"). "An agency . . . may not avoid the requirements for promulgating rules by issuing its directives under different labels." *Id.* at 233. See also, *Detroit Edison Co v Dep't of Treasury*, 498 Mich 28, 45; 869 NW2d 810 (2015) (finding that, for an agency regulation of general applicability to have the force of law, it must fall under the definition of a properly promulgated rule).

d. Even where an administrative agency interprets a statute, its interpretation cannot conflict with the plain meaning of the statute. *In re Complaint of Rovas*, 482 Mich at 108. To the extent that the DIFS Orders are based on its interpretation of the Insurance Code, they are invalid, as they demand that the MACP violate the No-Fault Act's plain language.

e. DIFS has no authority to alter the claims that the MACP must accept for assignment. DIFS only has the narrow authority granted to it under MCL 500.3171 to appoint four of eleven governors to the MAIPF's Board, to approve the assigned claims plan, which occurred long ago, and make a report to the senate a year after the plan is approved, which also already occurred. The MACP is not a regulated entity like an insurance company or insurance producer. It only applies if there is no insurance policy at issue. The Legislature has made the decision as to what claims the MACP must accept and the limits on benefits the MACP must pay—DIFS does not have the authority to alter those decisions. Thus, DIFS has no authority to make the proclamations in its Orders.

f. DIFS has no authority to ban conduct that is in conformity with the Insurance Code. Any such attempt would exceed the power delegated to DIFS by the Legislature. See *Ins Institute v Commissioner*, 486 Mich 370, 407; 785 NW2d 67 (2010).

31. DIFS does not have the authority to issue rulings of general applicability without promulgating a rule under the APA. Because the Director's purported Orders were not promulgated rules, they do not have the force of law and, thus, are not enforceable. *Detroit Edison*, 498 Mich at 45. Moreover, no contested case existed in which the MAIPF participated to adjudicate its rights.

32. DIFS may not instruct the MACP as to which claims it will or will not cover, nor does it have the power to override the Legislature's determination that a statute is given immediate effect.

33. The MAIPF therefore seeks, in addition to an injunction staying the enforcement of the Orders, a Declaratory Ruling that the Orders are void and unenforceable as to the MAIPF and MACP.

COUNT II – INJUNCTIVE RELIEF

34. The MAIPF hereby realleges and incorporates the foregoing paragraphs as though fully set forth herein.

35. As explained above, DIFS and its Director seek to demand that the MAIPF and MACP violate the law and contend that DIFS and its Director have the authority to enforce the Orders against the MAIPF and MACP.

36. DIFS and its Director should be enjoined from seeking to enforce the Orders for the following reasons:

a. The Director's purported Orders violate the Michigan Constitution's separation of powers principles. While an administrative agency has "quasi-legislative" powers, such powers are limited to rule making. *In re Complaint of Rovas*, 482 Mich at 98. An administrative agency, such as DIFS, "cannot exercise legislative power by creating law or changing the laws enacted by the Legislature." *Id.* Thus, DIFS cannot promulgate any rule that conflicts with a statute because only the Legislature may make law. See *id.* By attempting to rewrite the Amendments, the Director is usurping the Legislature's power in violation of section 2 of article 3 of the Michigan Constitution of 1963. Const 1963, art 3, § 2.

b. Because the Director's Orders are not the result of contested cases, they are not derived from administrative agencies' "quasi-judicial" power. DIFS has no authority to issue a rule of law by issuing a purported judicial opinion. DIFS's power to adjudicate cases is limited to fact-finding in contested cases. *Id.* at 98.

c. The Orders do not have the force of law because agencies do not have the power to unilaterally issue pronouncements that have the force of law. *In re Reliability Elec. Utils. for 2017-2021*, 325 Mich App at 232-233 (quoting *Faircloth*, 232 Mich App at 403-404)("An agency should resort to formal APA rulemaking when establishing policies that 'do not merely interpret or explain the statute or [rules from which the agency derives its authority,' but rather 'establish the substantive standards implementing the program.'"). "An agency . . . may not avoid the requirements for promulgating rules by issuing its directives under different labels." *Id.* at 233. See also, *Detroit Edison Co*, 498 Mich at 45 (finding that, for an agency regulation of

general applicability to have the force of law, it must fall under the definition of a properly promulgated rule).

d. Even where an administrative agency interprets a statute, its interpretation cannot conflict with the plain meaning of the statute. *In re Complaint of Rovas*, 482 Mich at 108. To the extent that DIFS Orders are based on its interpretation of the Amendments, they are invalid, as they seek to demand that the MACP violate the Amendments' plain language.

e. DIFS has no authority to alter the claims that the MACP must accept for assignment. The Legislature has made the decision as to what claims the MACP must accept and the limits on benefits the MACP must pay—DIFS does not have the authority to alter those decisions. Thus, DIFS has no authority to make the proclamations in its Orders.

f. DIFS has no authority to ban conduct that is in conformity with the Insurance Code. Any such attempt would exceed the power delegated to DIFS by the Legislature. See *Ins Institute v Commissioner*, 486 Mich at 407.

37. As established in the accompanying Motion for Preliminary Injunction and Brief, with these arguments the MAIPF has a likelihood of success on the merits.

38. The MAIPF and MACP will suffer irreparable harm if DIFS's purported Orders are not restrained and DIFS is allowed to take enforcement action, requiring the MACP to violate the law, resulting in exposure to litigation from claimants, whose benefits are delayed, and insurers, to whom claims are returned, in addition to incurring financial losses that are not recoverable. Alternatively, if the MAIPF and MACP violate the Orders, they will become the target of enforcement and disciplinary action by DIFS and its Director.

39. DIFS will not be harmed by a temporary restraining order because it has no authority to amend legislation, or to order the MAIPF or MACP to violate the Amendments. DIFS cannot be harmed by the non-enforcement of its invalid and unauthorized Orders.

40. It is in the public interest to stay the Orders because numerous claimants will be delayed receiving benefits, which undermines the very purposes of the No-Fault Act to provide fast payment for economic losses, specifically, medical bills, wage loss, and replacement services without the need to initiate a tort suit. *Shavers v Attorney General*, 402 Mich 554, 622; 267 NW2d 72 (1978). Moreover, an injunction merely preserves the enforcement of the No-Fault Act, as written and prevents an unconstitutional usurping of Legislative power by DIFS.

41. The weighing of the interests between the parties favors the MACP because it is in the public interest for an administrative agency to comply with the plain language of the statutory amendments put in place by Michigan's Legislature, and passed by more than a two-thirds vote.

RELIEF SOUGHT

WHEREFORE, the MAIPF, on behalf of the MACP, requests this Court ENJOIN DIFS and its Director from enforcing their purported Orders of September 20, 2019 and September 24, 2019 and declare that:

(i) DIFS's purported Orders of September 20, 2019 and September 24, 2019 are not enforceable because DIFS, as an administrative agency, and its Director do not have the authority to issue orders of general applicability that have the force of law, the violation of which may result in enforcement action. Any rules of general applicability must be promulgated under the APA and are limited to falling within the scope of authority delegated to DIFS by the Legislature.

(ii) DIFS does not have the authority to amend or alter Michigan law, and any attempt to do so, is a violation of separation of power principles under Michigan's Constitution.

(iii) The purported Orders of September 20, 2019 and September 24, 2019 demand that the MAIPF and MACP violate the plain language of the No-Fault Act. DIFS does not have the authority to impose its Orders on the MAIPF or MACP and, as a result, the purported Orders of September 20, 2019 and September 24, 2019 are unenforceable.

(iv) The cap set forth in MCL 500.3172(7) became effective on June 11, 2019.

Respectfully submitted,

DYKEMA GOSSETT PLLC

Date: October 14, 2019

By: Lori McAllister

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VERIFICATION

I hereby verify that the factual contents of this Complaint For Injunctive Relief And Declaratory Ruling are based on my knowledge and investigation, and are true to the best of my knowledge.

Dated: October 14, 2019

Kimberly Bezy

Tab A

STATE OF MICHIGAN
DEPARTMENT OF INSURANCE AND FINANCIAL SERVICES

Before the Director of the Department of Insurance and Financial Services

In the matter of:

Requirement to File Forms and Rates Prior to Implementing Public Acts 21 and 22

Order No. 19-048-M

Issued and entered
this 20th day of September 2019
By Anita G. Fox
Director

I. BACKGROUND

Public Acts 21 and 22 of 2019 (PA 21 and PA 22) were enacted into law on June 11, 2019. Several provisions of the Insurance Code (Code) that were amended by PA 21 and PA 22 (amended provisions) were effective June 11, 2019; other provisions are not effective until July 2, 2020. It has come to the Director's attention that a limited number of automobile insurers have attempted to apply the amended provisions to claims made under existing, in-force policies without first submitting revised forms and rates for the Director's review and approval. Regardless of their effective date, amended provisions that affect the scope of coverage required to be provided under automobile policies may not be implemented until automobile insurers have submitted revised forms and rates for the Director's review and approval. Such amended provisions include, but are not limited to, Sections 3009, 3111, 3113, 3114, and 3115, MCL 500.3009, 500.3111, 500.3113, 500.3114, and 500.3115.

This order notifies automobile insurers that any attempt to implement the amended provisions that affect the scope of coverage required to be provided under an insurance policy without submitting revised policy forms and rates to DIFS for review and approval would violate Sections 2106, 2108, and 2236 of the Code, MCL 500.2106, 500.2108, and 500.2236.

II. ANALYSIS

Pursuant to Sections 2106, 2108, and 2236 of the Code, MCL 500.2106, 500.2108, and 500.2236, forms and rates are subject to the Director's review and disapproval. These sections of the Code were unchanged by PA 21 or PA 22 and remain the requisite procedure prior to a company's form or rate use. Section 2106(3)[1] provides that an insurer "may use rates for automobile insurance ... as soon as those rates are filed," which requires that the rates are filed with the Director.[2] Section 2108(6) provides: "An insurer shall not make, issue, or renew a contract or policy except in accordance with filings that are in effect for the

[1] This section was amended by PA 21 and PA 22, but the amendments are not effective until July 2, 2020.
[2] Rate filings must comply with all applicable sections of the Code, including but not limited to Sections 2109 and 2110, MCL 500.2109 and 500.2110.

insurer under this chapter." Section 2236(1) provides that "an insurer shall not deliver or issue for delivery in this state a basic insurance policy form ... unless a copy of the form is filed with the department and approved by the director as conforming with the requirements of this act and not inconsistent with the law." Section 2236(5) of the Code establishes the Director's broad authority to disapprove, withdraw approval, or prohibit the issuance of all types of insurance policy forms, and permits the Director to "... prohibit the issuance, advertising, or delivery of a form to any person in this state if the form violates this act, contains inconsistent, ambiguous, or misleading clauses, or contains exceptions and conditions that unreasonably or deceptively affect the risk purported to be assumed in the general coverage of the policy." Insurers that implement the amended provisions that affect the scope of coverage required to be provided under automobile insurance policies without first revising their forms or rates are in violation of Sections 2106, 2108, and 2236 of the Code, MCL 500.2106, 500.2108 and 500.2236.

In addition, any attempt by automobile insurers to rely on a "conformity to law clause"[3] within their policies as a way to adopt the amended provisions without substantively revised forms would constitute a violation of Section 2236(5) of the Code as reliance upon an insurance policy provision that "unreasonably and deceptively affect[s] the risk purported to be assumed in the general coverage of the policy."

Finally, the Code prohibits automobile insurers from reducing the coverage available under a policy without first providing notice to policyholders. Under Section 2104(5) of the Code, MCL 500.2104(5), the offering of coverage with less favorable terms or conditions than those previously provided is considered to be a "termination" unless the reduction in coverage was requested by the policyholder or if the terms and conditions of the coverage previously provided were no longer available from the insurer anywhere in Michigan. Further, when an insurer fails to provide notice to a policyholder of a reduction in coverage, the insurer is bound to the original coverage when the reduction was not brought to the insured's attention. See, e.g., *Casey v Auto-Owners Ins Co*, 273 Mich App 388 (2006).

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Director FINDS and CONCLUDES that:

1. Several provisions of the Code that were amended by PA 21 and PA 22 affect the scope of coverage required to be provided under automobile insurance policies.

2. PA 21 and PA 22 did not amend Sections 2106, 2108, and 2236 of the Code, MCL 500.2106, 500.2108, and 500.2236, which subject insurance policy forms and rates, and any revisions thereto, to DIFS' review and approval.

3. Implementation of statutory amendments that affect the scope of coverage required to be provided under an insurance policy without first revising insurance policy forms and rates to account for coverage reductions and then submitting such forms and rates to DIFS for

[3] This includes any clause that purports to "conform" a policy to a change in law without providing notice to policyholders, and can take the form of a "conformity to state law" clause or a policy provision that generically states that coverage is to be afforded "pursuant to Michigan law" or similarly broad language.

review and approval would violate Sections 2106, 2108, and 2236 of the Code, MCL 500.2106, 500.2108, and 500.2236.

4. Implementation of statutory amendments that affect the scope of coverage required to be provided under an insurance policy through reliance on a "conformity to law clause " would violate Section 2236(5) of the Code, MCL 500.2236(5), as reliance upon an insurance policy provision that "unreasonably and deceptively affect[s] the risk purported to be assumed in the general coverage of the policy."

5. Failure by an automobile insurer to provide written notice to policyholders regarding reductions to coverage provided under an insurance policy is contrary to Section 2104(5) of the Code, MCL 500.2104(5), and Michigan case law.

III. ORDER

Therefore, it is ORDERED that:

1. No automobile insurer shall incorporate amendments made by PA 21 and PA 22 that affect the scope of coverage required to be provided under an insurance policy into a policy form without first submitting its revised forms and rates for the Director's review and approval.

2. An automobile insurer shall not rely on "conformity to law clauses" or other similar provisions in its policy forms as a method of incorporating the statutory amendments that affect the scope of coverage required to be provided under an insurance policy under PA 21 and PA 22.

3. Any automobile insurer that wishes to revise its policy forms must submit revised forms and rate revisions to the Director for approval. The Director will disapprove any form or rate filings that incorporate statutory amendments prior to their effective date.

4. Any automobile insurer that has processed claims in accordance with the statutory amendments that affect the scope of coverage required to be provided under an insurance policy without first submitting revised forms and rates for the DIFS' review and approval shall immediately re-process those claims in accordance with the terms and conditions of the existing policy form.

5. The Assigned Claims Plan shall not provide coverage for claims that have been tendered to it under forms that purport to incorporate amendments made by PA 21 and PA 22 that affect the scope of coverage required to be provided under an insurance policy unless those forms have been approved by the Director.

6. Failure to comply with the form and rate filing and approval requirements of the Code and/or failing to comply with this Order will result in disapproval or withdrawal of approval of the form or rate and may subject the insurer to appropriate administrative action.

The Director specifically retains jurisdiction of the matters contained herein and the authority to issue such further orders and take such further actions as she shall deem just, necessary and appropriate.

Anita G. Fox
Director

Tab B

STATE OF MICHIGAN
DEPARTMENT OF INSURANCE AND FINANCIAL SERVICES

Before the Director of the Department of Insurance and Financial Services

In the matter of:

Effective Date of the Cap on PIP Benefits
Provided Under the Michigan Assigned Claims Plan
/

Order No. 19-049-M

Issued and entered
this 24th day of September 2019
by Anita G. Fox
Director

I. BACKGROUND

Public Acts 21 and 22 of 2019 were enacted into law on June 11, 2019. Several provisions of the Insurance Code (Code) that were amended by PA 21 and PA 22 were effective June 11, 2019; other provisions are not effective until July 2, 2020.

It has come to the Director's attention that the Michigan Automobile Insurance Placement Facility (MAIPF), which administers the Michigan Assigned Claims Plan (MACP), may attempt to impose a $250,000 cap on benefits under Section 3107c(1)(b) of the Code, pursuant to Section 3172(7)(a), prior to July 2, 2020.

The authority for this order is derived from the following:

- the authority conferred upon the Department of Insurance and Financial Services (DIFS) pursuant to Section 200 of the Code, MCL 500.200, and its obligation to execute the laws of this state in relation to insurance;

- the Director's authority to issue orders in the reasonable exercise of discretion pursuant to Section 205 of the Code, MCL 500.205, with the intent to adhere to the Code's long-standing legislative purpose to protect policyholders, creditors and the public; and

- the Director's supervisory authority over the MAIPF and MACP as set forth in Sections 3171(3) and 3171(4) of the Code, MCL 500.3171(3); MCL 500.3171(4).

Pursuant to the above authority, this order notifies the MAIPF that any attempt to rely on the amendments made by PA 21 and PA 22 to cap benefits at $250,000 prior to July 2, 2020, is prohibited.

II. ANALYSIS

Pursuant to Section 3172(7)(a) of the Code, "the [MACP] and the insurer to whom a claim is assigned by the [MACP] are only required to provide personal protection insurance benefits under section 3107(1)(a) up to ... [$250,000]." *See* MCL 500.3172(7)(a); MCL 500.3107c(1)(b). An exception exists to the imposition of the $250,000 cap if the injured person claims benefits through the MACP when, pursuant to Section 3107 or 3019a(2), the person is injured during the 30-day window in which the person had a lapse in qualified health insurance or other health and accident coverages. In that case, the capped amount totals $2,000,000. *See* MCL 500.3172(7)(b).

Adherence to sound principles of statutory construction against rendering any part of a statute surplusage or nugatory requires that the effective date of the entirety of Section 3172(7) is July 2, 2020. *See Badeen v PAR, Inc*, 496 Mich 75, 81; 853 NW2d 303 (2014) ("When reviewing a statute, courts should avoid a construction that would render any part of the statute surplusage or nugatory.").

The Code "was enacted for the benefit of the public and the insurance laws should be liberally construed in favor of policy holders, creditors and the public." *See Murphy v Seed-Roberts Agency, Inc.*, 79 Mich App 1, 9 (1977) (citing *Dearborn National Ins Co v Comm'r of Insurance*, 329 Mich 107, 118 (1950); *Comm'r of Insurance v American Life Ins Co*, 290 Mich 33, 43-44 (1939)). *See also King v State*, 488 Mich 208, 218 (2010) ("The extensive regulation of the insurance industry provided for in [the Insurance Code] indicates a legislative purpose to protect policyholders.") (citing *In re Certified Question*, 413 Mich 22, 38 (1982)).

Per the plain language of Section 3172(7)(b), subdivision (7)(b) applies if a person is entitled to claim benefits "under the [MACP] under section 3107d(6)(c) or 3109a(2)(d)(ii) ..." Because the effective date of Sections 3107d and 3109a(2) is expressly July 2, 2020, there is no person who can claim benefits from the MACP under those sections until July 2, 2020, which would render Section 3172(7)(b) meaningless unless its effective date is also July 2, 2020. Subdivisions 7(a) and 7(b) of Section 3172 are interdependent: 7(a) explicitly references 7(b). To avoid a meaningless interpretation of Section 3172(7)(b), the entirety of Section 3172(7) must take effect on July 2, 2020, precluding the MACP from imposing a $250,000 cap on benefits until that date. This interpretation allows Section 3172(7) to function in a coherent manner and is consistent with the fundamental principles of statutory construction noted above.

The interpretation of Section 3172(7) as having an effective date of July 2, 2020, is further supported by reference to other amendments made by PA 21 and PA 22. In this regard, Section 3009 of the Code, MCL 500.3009, sets forth various liability coverage limits with an effective date of July 2, 2020. If the Director interpreted Section 3172(7) as having an effective date prior to July 2, 2020, pedestrians and uninsured occupants who claim benefits from the MACP subject to the $250,000 cap, and whose expenses exceed that amount, will be able to sue an at-fault driver for the remainder. However, the defendant driver would be limited to the pre-amendment residual liability protections, and any amount of liability over those amounts could subject the defendant to significant financial harm. This potentially catastrophic exposure to residual liability—which was not contemplated by the policyholder at the time of entry into the existing insurance contract—contravenes the Code's long-standing legislative purpose of policyholder protection.

II. FINDINGS OF FACT

The Director FINDS that:

1. Public Acts 21 and 22 of 2019 were enacted into law on June 11, 2019. Several provisions of the Insurance Code (Code) that were amended by PA 21 and PA 22 were effective June 11, 2019; other provisions are not effective until July 2, 2020.

2. It has come to the Director's attention that the Michigan Automobile Insurance Placement Facility (MAIPF), which administers the Michigan Assigned Claims Plan (MACP), may attempt to impose a $250,000 cap on benefits under prior to July 2, 2020.

3. The Code was enacted for the benefit of the public, and the Director must interpret it in favor of policyholders and the public.

II. CONCLUSIONS OF LAW

The Director CONCLUDES:

1. Implementation of the $250,000 cap on MACP benefits under Section 3107c(1)(b) of the Code, pursuant to Section 3172(7), prior to July 2, 2020, would conflict with the longstanding legislative purpose of the Code to protect policyholders, creditors and the public.

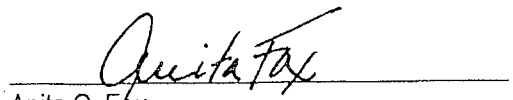
2. Implementation of the $250,000 cap on MACP benefits under Section 3107c(1)(b) of the Code, pursuant to Section 3172(7), prior to July 2, 2020, ignores sound principles of statutory construction.

3. Implementation of the $250,000 cap on MACP benefits under Section 3107c(1)(b) of the Code, pursuant to Section 3172(7), prior to July 2, 2020, frustrates the intent of other statutory amendments, including the residual liability protections contained in Section 3009 of the Code, MCL 500.3009.

III. ORDER

Therefore, it is ORDERED that the MAIPF shall not impose a $250,000 cap on MACP benefits under Section 3107c(1)(b) of the Code, pursuant to Section 3172(7)(a), prior to July 2, 2020.

The Director specifically retains jurisdiction of the matters contained herein and the authority to issue such further orders as she shall deem just, necessary and appropriate.



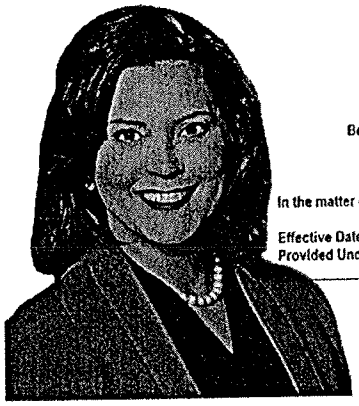
Anita G. Fox
Director

Tab C

Shadrach Strehle Sep 24

BREAKING: Gov. Whitmer Retreats From No-Fault Changes

Michigan Department of Insurance and Financial Services Issues Order Halting Enforcement



STATE OF MICHIGAN
DEPARTMENT OF INSURANCE AND FINANCIAL SERVICES

Before the Director of the Department of Insurance and Financial Services

In the matter of:

Effective Date of the Cap on PIP Benefits Provided Under the Michigan Assigned Claims Plan

Order No. 19-049-M

Issued and entered
this 24th day of September 2019
by Anita G. Fox
Director

LANSING (Great Lakes News) - Gov. Gretchen Whitmer used her executive authority to amend the enforcement of the no-fault insurance reform legislation she signed in June. Director of the Michigan Department of Insurance and Financial Services Anita G. Fox issued a Director's Order postponing the $250,000 cap on personal injury protection established by the legislation per the governor's request.

Whitmer promised to make the change while in a closed-door meeting with advocates opposing the law. According to John Cornack, president of the Eisenhower Center which provides care for those who suffer brain injuries, Whitmer promised to use her powers to return complete coverage to auto accident survivors. Whitmer was reportedly moved by stories of life-altering injuries going untreated since she signed the law.

Cornack said the governor's actions were to "help soften the outcome of the new law" and postpone its provisions. Previously, the law phased out no-fault coverage in preparation for its full effects in July, 2020. CPAN (Coalition Protecting Auto No-Fault) reportedly "thanked her for her actions."

"This is a very good sign that the governor cares about the damage that's been done by this bill to so many," said John Gwynne Prosser II, President of the Neurotrauma Association. "It's a good first step."

The law's full effects, including the $250,000 cap on personal injury protection, will be implemented on July 1, 2020. Activists will march in Lansing on Wednesday protesting the law and urging its reexamination before the July start date.

Tab 2

Neutral
As of: October 14, 2019 1:02 PM Z

Spectrum Health Hosps. v. Mich. Assigned Claims Plan

Court of Appeals of Michigan

September 24, 2019, Decided

No. 343563

Reporter
2019 Mich. App. LEXIS 5749 *; 2019 WL 4648448

SPECTRUM HEALTH HOSPITALS, Plaintiff-Appellant, v MICHIGAN ASSIGNED CLAIMS PLAN, MICHIGAN AUTOMOBILE INSURANCE PLACEMENT FACILITY, and JOHN DOE INSURANCE COMPANY, Defendants-Appellees.

Notice: THIS OPINION IS UNCORRECTED AND SUBJECT TO REVISION BEFORE PUBLICATION IN THE MICHIGAN COURT OF APPEALS REPORTS.

Prior History: **[*1]** Kent Circuit Court. LC No. 17-007964-NF.

Spectrum Health Hosps. v. Mich. Assigned Claims Plan, 2019 Mich. App. LEXIS 3865 (Mich. Ct. App., July 15, 2019)

Core Terms

insurer, benefits, no-fault, claimant, assign, notice, ineligible, notify, eligibility, summary disposition, coverage, motor vehicle accident, injured person, motor vehicle, time of an accident, investigator, promptly, driver, automobile insurance, signature, preparer

Case Summary

Overview

HOLDINGS: [1]-The health care provider gave the Michigan Assigned Claims Plan (MACP)/Michigan Automobile Insurance Placement Facility (MAIPF) the notice required under *MCL 500.3174* as it filed the application for assignment within one year as required by *MCL 500.3145*; [2]-By indicating that it was "unknown" to the provider whether the passenger, her resident relatives, the driver, or the involved vehicle possessed a no-fault policy, the provider communicated that applicable personal injury protection (PIP) benefits could not be identified, and the MACP/MAIPF was then required by *MCL 500.3174* to promptly assign the claim; [3]-The MACP/MAIPF did not promptly assign the claim and did not notify the provider of its denial; [4]-The claim could not be deemed obviously ineligible and the MACP/MAIPF was duty-bound to assign it to an insurer.

Outcome
.Judgment reversed and remanded.

LexisNexis® Headnotes

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > Appeals > Summary Judgment Review > Standards of Review

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

HN1[] **Standards of Review, De Novo Review**

The appellate court reviews de novo a circuit court's resolution of a summary disposition motion. A motion under *MCR 2.116(C)(10)* tests the factual support of a plaintiff's claim. Summary disposition is appropriate under subsection (C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. In reviewing such motions, the appellate court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial. A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Governments > Legislation > Interpretation

HN2[] **Standards of Review, De Novo Review**

The appellate court also reviews de novo underlying issues of statutory interpretation. The primary goal of statutory interpretation is to discern the intent of the Legislature. The best indicator of the Legislature's intent is a plain reading of the statutory language. If the statutory language is unambiguous, the appellate court presumes that the Legislature intended the meaning that it clearly expressed, and further construction is neither required nor permitted.

Insurance Law > ... > No Fault Coverage > Personal Injury Protection > Medical Benefits

Insurance Law > ... > Motor Vehicle Insurance > Coverage > No Fault Coverage

HN3[] **Personal Injury Protection, Medical Benefits**

In 1973, the Legislature enacted the no-fault insurance act, *MCL 500.3101 et seq.*, to provide victims of motor vehicle accidents assured, adequate, and prompt reparation for certain economic losses. It established the no-fault scheme, in part, to rectify problems with the tort-based compensation scheme, which frequently denied benefits to a high percentage of motor vehicle accident victims.

Insurance Law > ... > No Fault Coverage > Personal Injury Protection > Medical Benefits

HN4[] **Personal Injury Protection, Medical Benefits**

To achieve its goals, the Legislature required the owner or registrant of a motor vehicle required to be registered in this state in relevant part to purchase personal injury protection (PIP) insurance to cover injuries to persons caused by motor vehicles, *MCL 500.3101(1)*. The Legislature provided that the policies required under *MCL 500.3101(1)* must cover more than just the named insured; policies must also cover injuries incurred in motor vehicle accidents by the named individual's spouse and any relative domiciled in the same household, *MCL 500.3114(1)*. When an injured person is not covered by his or her own insurance policy or a policy owned by a relative, the Legislature provided that the insurers of the various vehicles involved or occupied during the accident, or the insurers of persons operating such vehicles, must cover the loss, *MCL 500.3114(2)-(5)*; *MCL 500.3115*.

Insurance Law > ... > No Fault Coverage > Personal Injury Protection > Medical Benefits

HN5[] **Personal Injury Protection, Medical Benefits**

Even where there does not appear to be any applicable personal injury protection (PIP) coverage, the Legislature provided that an injured person could obtain PIP benefits through the Michigan Assigned Claims Plan (MACP), *MCL 500.3172(1)*. All self-insurers or insurers writing insurance as provided by the no-fault insurance act are required to participate in the MACP, with the associated costs being allocated fairly among insurers and self-insurers, *MCL 500.3171(2)*. In this way, the Legislature ensured that every person injured in a motor vehicle accident would have access to PIP benefits unless one of the limited exclusions in the no-fault act apply, and the losses suffered by uninsured persons injured in motor vehicle accidents could be indirectly passed on to the owners and registrants of motor vehicles through insurance premiums.

Business & Corporate Compliance > ... > Regulators > State Insurance Commissioners & Departments > Rules & Regulations

Insurance Law > ... > No Fault Coverage > Personal Injury Protection > Medical Benefits

HN6[] **State Insurance Commissioners & Departments, Rules & Regulations**

The Legislature initially required the Secretary of State to organize and maintain the Michigan Assigned Claims Plan (MACP)/Michigan Automobile Insurance Placement Facility (MAIPF). It further authorized the Secretary of State to promulgate rules to implement the facility and plan, *MCL 500.3171*. In 2012, the Legislature shifted the obligation to adopt and maintain the MACP from the Secretary of State to the MAIPF, *MCL 500.3171(1)*. The Legislature originally created the MAIPF to provide no-fault insurance to any person who was unable to obtain insurance through ordinary means, *MCL 500.3301*. The MAIPF is not a state agency; it is a nonprofit organization of insurer members, *MCL 500.134(6)(d)*. Therefore, it is not subject to the rules governing state agencies, such as the Freedom of Information

Act, MCL 500.134(4). The insurers tasked with covering losses under the MACP indirectly controlled the administration of the MACP through their control of the MAIPF, MCL 500.3310.

Insurance Law > ... > No Fault Coverage > Personal Injury Protection > Medical Benefits

HN7[] Personal Injury Protection, Medical Benefits

Although the Legislature authorized the Michigan Automobile Insurance Placement Facility (MAIPF) to establish its own Michigan Assigned Claims Plan (MACP), MCL 500.3171(2), the Legislature did not authorize the MAIPF to establish eligibility criteria. Rather, MCL 500.3172(1) provided the eligibility criteria for the MACP: A person entitled to claim because of accidental bodily injury arising out of the ownership, operation, maintenance, or use of a motor vehicle as a motor vehicle in this state may obtain personal injury protection (PIP) benefits through the MACP if no PIP is applicable to the injury, no PIP applicable to the injury can be identified, the PIP applicable to the injury cannot be ascertained because of a dispute between 2 or more automobile insurers concerning their obligation to provide coverage or the equitable distribution of the loss, or the only identifiable PIP applicable to the injury is, because of financial inability of 1 or more insurers to fulfill their obligations, inadequate to provide benefits up to the maximum prescribed, MCL 500.3172(1).

Insurance Law > ... > No Fault Coverage > Personal Injury Protection > Medical Benefits

HN8[] Personal Injury Protection, Medical Benefits

The phrase a "person entitled to claim" refers to a person who is entitled to claim personal injury protection (PIP) benefits under the no-fault act. And such a person may claim against the Michigan Assigned Claims Plan (MACP) when any of the four following conditions are true: (1) no PIP is applicable to the injury, (2) no PIP applicable to the injury can be identified, (3) the applicable insurance cannot be ascertained due to a dispute among insurers, or (4) the only applicable insurance is inadequate due to financial inability. The Legislature also disqualified some persons from coverage under the MACP.

Insurance Law > ... > No Fault Coverage > Personal Injury Protection > Medical Benefits

HN9[] Personal Injury Protection, Medical Benefits

In addition to establishing eligibility criteria and disqualifying factors, the Legislature provided a framework for the processing, timing, and review of claims under the Michigan Assigned Claims Plan (MACP). The Legislature stated that a person who claims personal injury protection (PIP) benefits through the MACP must notify the Michigan Automobile Insurance Placement Facility (MAIPF) of his or her claim within the time limit for filing a PIP claim with an insurer: A person claiming through the MACP shall notify the MAIPF of his or her claim within the time that would have been allowed for filing an action for PIP benefits if identifiable coverage applicable to the claim had been in effect, MCL 500.3174. Once the person notifies the MAIPF of his or her claim, it must promptly assign the claim in accordance with the plan and notify the claimant of the identity and address of the insurer to which the claim is assigned. Before assigning the claim to a member insurer, however, the MAIPF must make an initial determination of a claimant's eligibility for benefits under the MACP and shall deny an obviously ineligible claim, MCL 500.3173a(1). The MAIPF must notify the claimant of the reasons for denial promptly in writing.

Insurance Law > ... > No Fault Coverage > Personal Injury Protection > Medical Benefits

HN10[] Personal Injury Protection, Medical Benefits

MCL 500.3172(1) provides that a claim is eligible for assignment when no personal injury protection applicable to the injury can be identified.

Insurance Law > ... > No Fault Coverage > Personal Injury Protection > Medical Benefits

HN11[] Personal Injury Protection, Medical Benefits

Nothing in the no-fault act requires a claimant to file a claim with the Michigan Assigned Claims Plan (MACP)/Michign Automobile Insurance Placement Facility (MAIPF) on a form application or through communication signed by the claimant. These requirements come entirely from the "Michigan Assigned Claims Plan" adopted, implemented and maintained by the MAIPF. Michigan Assigned Claims Plan, § 1. Section 5.1(A) of the Plan provides, A claim for personal injury protection benefits under the MACP must be made on an application prescribed by the MAIPF. The MAIPF requires that the application be complete and signed by the claimant. The application also must be accompanied by reasonable

proof of loss, and documentation supporting that due diligence was exercised to establish the claimant is entitled to claim benefits through the MACP, Michigan Assigned Claims Plan, § 5.1(B)(1).

Insurance Law > ... > No Fault Coverage > Personal Injury Protection > Medical Benefits

HN12[] **Personal Injury Protection, Medical Benefits**

Mandating strict adherence to the minutiae of these notice provisions would be inconsistent with Michigan law. Even with the notice provisions enacted by the Legislature in the no-fault act, substantial compliance that fulfills the purpose of the statute is sufficient to preserve a claim. The purpose of notice under *MCL 500.3145(1)* is simply to convey the name and address of the claimant and the name of the person injured and the time, place and nature of the injury. Given this purpose, the Supreme Court found adequate notice where the injured person never notified his insurer of the accident, but the healthcare provider submitted its bills for reimbursement directly to the insurer. The notice provided under *MCL 500.3145(1)* need not even be in writing.

Insurance Law > ... > No Fault Coverage > Personal Injury Protection > Medical Benefits

HN13[] **Personal Injury Protection, Medical Benefits**

Ultimately, the Michigan Assigned Claims Plan (MACP)/Michign Automobile Insurance Placement Facility (MAIPF) has only those rulemaking powers conveyed to it by the Legislature. The MACP/MAIPF's powers must derive from *MCL 500.3171* to *MCL 500.3179*. The Legislature authorized the MAIPF's board of governors to adopt an MACP, *MCL 500.3171(3)*. However, the authority to adopt a plan does not grant the authority to establish rules governing the processing, timing, and review of claims under the MACP; those requirements are enumerated by statute. While the Legislature subsequently enacted *MCL 500.3173a*, giving the Secretary of State and then the MAIPF the limited authority to deny claims that are obviously ineligible, the Legislature did not substantively alter the remainder of the no-fault act to expand the MAIPF's authority. Notice is reasonable proof of the fact and of the amount of loss sustained, *MCL 500.3142(2)*.

Insurance Law > ... > No Fault Coverage > Personal Injury Protection > Medical Benefits

HN14[] **Personal Injury Protection, Medical Benefits**

An insurer cannot vitiate its statutory duty to pay benefits in a timely fashion through a contractually agreed upon condition precedent; rather, once it receives reasonable proof of the fact and amount of loss sustained, the insurer must comply with its statutory duty to pay. Similarly, once the Michigan Automobile Insurance Placement Facility receives reasonable proof of the fact and amount of loss sustained by a claimant eligible to claim benefits as stated in *MCL 500.3172(1)*, it must promptly assign the claim in accordance with the plan, *MCL 500.3174*.

Business & Corporate Compliance > ... > Regulators > State Insurance Commissioners & Departments > Rules & Regulations

Insurance Law > ... > No Fault Coverage > Personal Injury Protection > Medical Benefits

HN15[] **State Insurance Commissioners & Departments, Rules & Regulations**

MCL 500.3175 did not grant the Michigan Assigned Claims Plan (MACP)/Michign Automobile Insurance Placement Facility (MAIPF) authority to impose filing requirements beyond those provided in the statutes. *MCL 500.3175* includes a list of elements that the MAIPF was required to incorporate into the MACP when power transferred to the MAIPF from the Secretary of State. The statutory provisions address the transfer of claims already assigned or filed under the Secretary of State's plan to the MAIPF's plan and the allocation of costs during the crossover period. The purpose of the statute was to set the start date for filing claims with the new MACP, not to confer additional rulemaking authority. The fact that no court was asked to invalidate the old administrative rule requiring a signed application is not dispositive and does not establish that the Secretary of State had the statutory authority to promulgate the rule and deny claims for noncompliance.

Insurance Law > ... > No Fault Coverage > Personal Injury Protection > Medical Benefits

HN16[] **Personal Injury Protection, Medical Benefits**

The Michigan Assigned Claims Plan (MACP)/Michigan Automobile Insurance Placement Facility (MAIPF) is tasked only with making the initial determination of eligibility of a claim and may only deny a claim if it is obviously ineligible,

MCL 500.3173a(1). Eligibility is determined by the conditions outlined in MCL 500.3172(1), not by the form in which the notice is given. The MACP/MAIPF could request that the claimant amend the notice to comply with its form application to make its tasks more manageable, but it could not declare the claim to be obviously ineligible based on a minor nonconformity.

Counsel: For SPECTRUM HEALTH HOSPITALS, Plaintiff-Appellant: JOSEPH J. GAVIN.

For MICHIGAN ASSIGNED CLAIMS PLAN, MICHIGAN AUTOMOBILE INSURANCE PLACEMENT FACILITY, JOHN DOE INSURANCE COMPANY, Defendants-Appellees: ROBERT D. STEFFES.

Judges: Before: SWARTZLE, P.J., and GLEICHER and M. J. KELLY, JJ.

Opinion

PER CURIAM.

The Michigan Assigned Claims Plan (MACP)/Michigan Automobile Insurance Placement Facility (MAIPF) rejected Spectrum Health Hospital's claim for assignment because the injured party did not sign the assignment application. The purpose of the MACP is to ensure prompt coverage for persons injured in motor vehicle accidents when coverage cannot be found or is unavailable. To achieve that end, the MACP/MAIPF has extremely limited authority to deny claims for assignment—it may only deny an "obviously ineligible" claim. The absence of a signature does not meet that threshold. We reverse the award of summary disposition in the MACP/MAIPF's favor and remand for entry of summary disposition in favor of Spectrum.

I. BACKGROUND

Robin Benoit was seriously injured on August 30, 2016, while a passenger in a vehicle involved in a single-car motor vehicle accident. Spectrum Health **[*2]** provided more than $129,000 in services to Benoit from August 30 through September 19, 2016. Benoit was not covered by any no-fault insurance policy. Upon Benoit's admission, Spectrum secured a "verbal consent" witnessed by two staff members for a general assignment of rights; however, Benoit was "unable to sign." The hospital did not secure a more specific assignment to apply to the Michigan Assigned Claims Plan (MACP)/Michigan Automobile Insurance Placement Facility (MAIPF) on Benoit's behalf. Spectrum allegedly misplaced the general assignment, then searched high and low for Benoit, but to no avail.

On August 10, 2017, almost a year after the accident, Spectrum filed an "application for personal injury protection [PIP] benefits" with the MACP/MAIPF. Spectrum's agent signed as the "preparer" and the signature line for the "injured Person or Representative" was left blank. Spectrum directed the MACP/MAIPF to the police report, which indicated that the driver of the vehicle did not have no-fault insurance. The preparer answered "unknown" to several application questions, including the names of persons with whom Benoit lived at the time of the accident and any vehicles owned by Benoit **[*3]** at that time. The preparer also answered "unknown" to the questions: "At the time of the accident, did you have any auto insurance? If yes, list Name of Automobile Insurance Company & Policy Number," and "Are you filing this claim because there is a dispute between two or more insurance companies for your [PIP] coverage?" The application did include the address and phone number provided by Benoit in the hospital and her Medicaid policy number, as well as the vehicle operator's driver's license number. The preparer did not know if there was "automobile insurance in effect for this vehicle on the date of the accident" or whether "the driver [had] automobile insurance in effect on the date of the accident."

Spectrum provided the MACP/MAIPF a "list of steps taken to find Auto Insurance" along with the application. It described Spectrum's attempts to contact Benoit by phone and mail, and to uncover additional contact information for its patient by searching various databases.

On August 14, 2017, the MACP/MAIPF sent Spectrum a generic form letter denying the application, stating:

> We have received the application for benefits through the [MACP], which you submitted on 08/10/2017. After careful **[*4]** review it has been determined that your application is ineligible for assignment under Michigan No Fault Act. If you have any questions regarding this determination please contact a representative for the [MACP], operated by the [MAIPF].

Spectrum then hired a private investigator to continue the search for Benoit. The investigator learned that the address and phone number given by Benoit at the hospital actually belonged to a personal friend who refused to speak to the investigator. The investigator uncovered another address for Benoit, which was a vacant lot. Benoit's former landlord had no forwarding information. On August 25, 2017, at 2:25 p.m., the investigator sent Benoit a private message on Facebook and she telephoned him five minutes later. Benoit indicated that at the time of the accident, her ex-boyfriend was driving his personal vehicle, which he had neither registered nor insured. Benoit confirmed that she did not own a vehicle,

have no-fault insurance, or live with anyone who carried no-fault insurance at the time of the accident.

On August 28, 2017, Benoit met with the investigator in person and signed an "assignment of rights, benefits and causes of action" to permit Spectrum **[*5]** to seek PIP benefits on her behalf. Spectrum forwarded the assignment to the MACP/MAIPF by fax on August 30, 2017, the final day to timely file a claim. The cover sheet informed the MACP/MAIPF that Spectrum had provided medical treatment to Benoit following her motor vehicle accident and that Spectrum had filed an application for assignment on August 10. Spectrum requested, "Please assign the claim, and notify us as to the assigned carrier."

The MACP/MAIPF immediately notified Spectrum that it was "unable to process the claim you have submitted on behalf of" Benoit and that it "require[d] additional information in order to move forward with [its] initial eligibility determination." The MACP/MAIPF stated that the matter had been referred to its "legal counsel for further handling which may include, but is not limited to, examinations under oath of the appropriate individuals."

That same day, Spectrum filed suit for mandamus and declaratory relief, asserting that the MACP/MAIPF had a clear legal and ministerial duty to assign the claim to a no-fault insurer under *MCL 500.3174*, which, at the time of Spectrum's application and suit, provided:

> A person claiming through the [MACP] shall *notify* the [MAIPF] **[*6]** of his or her claim within the time that would have been allowed for filing an action for [PIP] benefits if identifiable coverage applicable to the claim had been in effect. The [MAIPF] shall promptly assign the claim in accordance with the plan and notify the claimant of the identity and address of the insurer to which the claim is assigned. . . . [*MCL 500.3174*, as amended by 2012 PA 204 (emphasis added).][1]

The MACP/MAIPF bucked discovery attempts, contending that Spectrum's application for assignment was facially deficient as Spectrum made inadequate efforts before filing to determine whether Benoit had available insurance coverage. It announced its intent to file a motion for summary disposition "to draw a line in the sand to prevent these efforts at obtaining assignment with little more than the most bare of information." A subsequent summary disposition motion added that Spectrum did not have an independent right to assert a claim in its own name after *Covenant Med Ctr, Inc v State Farm Mut Auto Ins Co, 500 Mich 191; 895 NW2d 490 (2017)*.[2] The MACP/MAIPF further contended that the application was invalid because although Spectrum signed it as the preparer, no one signed as the claimant or claimant's representative as required by the plan's internal operating procedures. Specifically, Michigan **[*7]** Assigned Claims Plan, § 5.1(A)(1)(a)[3] provides that "[a] claim for [PIP] benefits under the Plan must be made on an application prescribed by the MAIPF" and that the application "must be complete and signed by the claimant," i.e., by "a person suffering accidental bodily injury arising out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle in this state."

Spectrum replied that it was entitled to summary disposition because the MACP/MAIPF was only authorized to reject an application if from the outset the claim was obviously ineligible under the no-fault act. The standard did not require the applicant to conclusively prove that no insurance was available, only that it made a good-faith effort to determine whether insurance was available. With its response, Spectrum included an affidavit from Benoit, avowing that she was merely a passenger in the vehicle involved in the accident and had no ownership or control over it. "[T]o the best of [her] knowledge, neither the vehicle's driver nor the vehicle itself was covered by a no-fault policy at the time of the accident," Benoit asserted. Benoit continued that she did not have a no-fault policy or reside with relatives **[*8]** maintaining policies at that time.

At the hearing on the counter motions for summary disposition, the MACP/MAIPF agreed that it now had sufficient information that Benoit did not have insurance available to her at the time of the accident. However, it continued to insist that the application was invalid at its inception based on the absence of Benoit's signature as claimant.

The circuit court agreed with the MACP/MAIPF and summarily dismissed Spectrum's action. The court acknowledged that Spectrum secured an assignment from Benoit after it filed its application. However, the court reasoned, the focus was on the application and whether it was

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[1] The statute was amended by 2019 PA 21, effective June 11, 2019.

[2] The Michigan Legislature "overruled" *Covenant* by amending *MCL 500.3112* to give healthcare providers the right to file a direct claim or cause of action against an insurer for reimbursement for services provided to an injured person. See 2019 PA 21, effective June 11, 2019. As such, the MACP/MAIPF's argument in this regard is no longer valid.

[3] The "Michigan Assigned Claims Plan" is available at <https://www.michacp.org/documents/MACP-Plan-of-Ops-Final.pdf> (accessed September 17, 2019).

valid when originally filed. The plan rules required that the application be signed by the claimant or her representative and Spectrum did not sign in that capacity. And Spectrum did not file a new or amended application after locating Benoit. The court concluded, "I'm constrained to agree that while it's a technical point, the law is full of technicalities, and in this case, the statute requires a person entitled to claim because of accidental bodily injury to file the request for the [MACP] to assign a carrier, and that person did not do so." The **[*9]** application was therefore fatally "defective," the court ruled.

The circuit court denied Spectrum's subsequent motion for reconsideration. Spectrum now appeals.

II. STANDARD OF REVIEW

HN1[↑] We review de novo a circuit court's resolution of a summary disposition motion. *Zaher v Miotke, 300 Mich App 132, 139; 832 NW2d 266 (2013)*. A motion under *MCR 2.116(C)(10)* "tests the factual support of a plaintiff's claim." *Walsh v Taylor, 263 Mich App 618, 621; 689 NW2d 506 (2004)*. Summary disposition is appropriate under *subsection (C)(10)* "if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *West v Gen Motors Corp, 469 Mich 177, 183; 665 NW2d 468 (2003)*. In reviewing such motions, we "consider[] the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Walsh, 263 Mich App at 621*. "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West, 469 Mich at 183*.

HN2[↑] We also review de novo underlying issues of statutory interpretation. *Joseph v Auto Club Ins Ass'n, 491 Mich 200, 205; 815 NW2d 412 (2012)*. The primary goal of statutory interpretation is to discern the intent of the Legislature. *Id.* The best indicator of the Legislature's intent is a plain reading of the statutory **[*10]** language. *Id. at 205-206*. "If the statutory language is unambiguous, we presume that the Legislature intended the meaning that it clearly expressed, and further construction is neither required nor permitted." *Id. at 206*.

III. GUIDING LEGAL PRINCIPLES

HN3[↑] In 1973, the Legislature enacted the no-fault insurance act, *MCL 500.3101 et seq.*, "to provide victims of motor vehicle accidents assured, adequate, and prompt reparation for certain economic losses." *Shavers v Attorney General, 402 Mich 554, 578-579; 267 NW2d 72 (1978)*. It established the no-fault scheme, in part, to rectify problems with the tort-based compensation scheme, which frequently "denied benefits to a high percentage of motor vehicle accident victims." *Id. at 579*.

HN4[↑] To achieve its goals, the Legislature required the "owner or registrant of a motor vehicle required to be registered in this state" in relevant part to purchase PIP insurance to cover injuries to persons caused by motor vehicles. *MCL 500.3101(1)*. The Legislature provided that the policies required under *MCL 500.3101(1)* must cover more than just the named insured; policies must also cover injuries incurred in motor vehicle accidents by the named individual's spouse and any relative domiciled in the same household. *MCL 500.3114(1)*. When an injured person is not covered by his or her own insurance policy or a policy owned by a relative, **[*11]** the Legislature provided that the insurers of the various vehicles involved or occupied during the accident, or the insurers of persons operating such vehicles, must cover the loss. See *MCL 500.3114(2)-(5)*; *MCL 500.3115*. *HN5*[↑] Even where there does not appear to be any applicable PIP coverage, the Legislature provided that an injured person could obtain PIP benefits through the MACP. See *MCL 500.3172(1)*. All self-insurers or insurers writing insurance as provided by the no-fault insurance act are required to participate in the MACP, with the associated costs being "allocated fairly among insurers and self-insurers." *MCL 500.3171(2)*. In this way, the Legislature ensured that every person injured in a motor vehicle accident would have access to PIP benefits unless one of the limited exclusions in the no-fault act apply, and the losses suffered by uninsured persons injured in motor vehicle accidents could be indirectly passed on to the owners and registrants of motor vehicles through insurance premiums.

HN6[↑] The Legislature initially required the Secretary of State to "organize and maintain" the MACP/MAIPF. See *1972 PA 345*. It further authorized the Secretary of State to "promulgate rules to implement the facility and plan." *MCL 500.3171*, as enacted by *1972 PA 345*. In 2012, the Legislature **[*12]** shifted the obligation to adopt and maintain the MACP from the Secretary of State to the MAIPF. *MCL 500.3171(1)*, as amended 2012 PA 204. The Legislature originally created the MAIPF to provide no-fault insurance to any person who was unable to obtain insurance through ordinary means. See *MCL 500.3301*. The MAIPF is not a state agency; it is a "nonprofit organization of insurer members." *MCL 500.134(6)(d)*. Therefore, it is not subject to the rules governing state agencies, such as the *Freedom of Information Act*. *MCL 500.134(4)*. After the passage of 2012 PA 204, the insurers tasked with covering losses under the MACP indirectly controlled the administration of the MACP through their control of the MAIPF. *MCL 500.3310* (establishing a board of governors to govern the MAIPF and

providing that seven of the 11 governors were to be elected as provided in the plan of operation and four were to be selected by the insurance commissioner).

HN7[↑] Although the Legislature authorized the MAIPF to establish its own MACP, *MCL 500.3171(2)*, the Legislature did not authorize the MAIPF to establish eligibility criteria. Rather, *MCL 500.3172(1)* provided the eligibility criteria for the MACP:

> A person entitled to claim because of accidental bodily injury arising out of the ownership, operation, maintenance, or use of a motor vehicle **[*13]** as a motor vehicle in this state may obtain [PIP] benefits through the [MACP] if no [PIP] is applicable to the injury, no [PIP] applicable to the injury can be identified, the [PIP] applicable to the injury cannot be ascertained because of a dispute between 2 or more automobile insurers concerning their obligation to provide coverage or the equitable distribution of the loss, or the only identifiable [PIP] applicable to the injury is, because of financial inability of 1 or more insurers to fulfill their obligations, inadequate to provide benefits up to the maximum prescribed. . . . [*MCL 500.3172(1)*, as amended 2012 PA 204.]

HN8[↑] The phrase a "person entitled to claim" refers to a person who is entitled to claim PIP benefits under the no-fault act. *Allstate Ins Co v State Farm Mut Auto Ins Co, 321 Mich App 543, 558-559; 909 NW2d 495 (2017)*. And such a person may claim against the MACP when any of the four following conditions are true: "(1) no [PIP] is applicable to the injury, (2) no [PIP] applicable to the injury can be identified, (3) the applicable insurance cannot be ascertained due to a dispute among insurers, or (4) the only applicable insurance is inadequate due to financial inability." *W A Foote Mem Hosp v Mich Assigned Claims Plan, 321 Mich App 159, 170; 909 NW2d 38 (2017)*. The Legislature also disqualified some persons from coverage under the MACP. See *MCL 500.3173* (stating that a person who falls **[*14]** within a limitation or exclusion under *MCL 500.3105* through *MCL 500.3116* is disqualified from receiving benefits under the MACP as well).

HN9[↑] In addition to establishing eligibility criteria and disqualifying factors, the Legislature provided a framework for the processing, timing, and review of claims under the MACP. The Legislature stated that a person who claims PIP benefits through the MACP must notify the MAIPF of his or her claim within the time limit for filing a PIP claim with an insurer: "A person claiming through the [MACP] shall notify the [MAIPF] of his or her claim within the time that would have been allowed for filing an action for [PIP] benefits if identifiable coverage applicable to the claim had been in effect." *MCL 500.3174*, as amended by 2012 PA 204. Once the person notifies the MAIPF of his or her claim, it must "promptly assign the claim in accordance with the plan and notify the claimant of the identity and address of the insurer to which the claim is assigned." *Id.* Before assigning the claim to a member insurer, however, the MAIPF must "make an initial determination of a claimant's eligibility for benefits under the MACP and shall deny an obviously ineligible claim." *MCL 500.3173a(1)*, as enacted by 2012 PA 204.[4] The MAIPF must notify the **[*15]** claimant of the reasons for denial promptly in writing. *Id.*

IV. NOTICE

Spectrum gave the MACP/MAIPF the notice required under *MCL 500.3174*. Spectrum filed the application for assignment within one year as required by *MCL 500.3145*. The claim described in the August 10, 2017 application was not "obviously ineligible" for assignment as contemplated in *MCL 500.3173a(1)*. *HN10*[↑] *MCL 500.3172(1)* provides that a claim is eligible for assignment when "no [PIP] applicable to the injury can be identified." By indicating that it was "unknown" to Spectrum whether Benoit, her resident relatives, the driver, or the involved vehicle possessed a no-fault policy, Spectrum communicated that applicable PIP benefits could not be identified. The MACP/MAIPF was then required by *MCL 500.3174* to promptly assign the claim.

The MACP/MAIPF did not promptly assign the claim. Indeed, it did not even comply with *MCL 500.3173a(1)* in notifying Spectrum of its denial. The form letter did not cite the reasons for rejection.

By the August 30, 2017 deadline for providing notice of its claim, Spectrum definitively learned that the claim was eligible for assignment under the first condition of *MCL 500.3172(1)*: there was "no [PIP] . . . applicable to the injury." Spectrum had located Benoit and confirmed that no no-fault insurance **[*16]** policy covered her injury. Benoit did not own a car or possess insurance, she was not domiciled with insured relatives, and her ex-boyfriend, the driver, had neither registered nor insured his vehicle. Spectrum then forwarded Benoit's assignment of rights to the MACP/MAIPF.

Spectrum notified the MACP/MAIPF of the grounds supporting eligibility and the right to assignment by also filing suit on August 30. This Court implicitly held in *Mendelson Orthopedics PC v. Everest Nat'l Ins. Co.*, __ Mich

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[4] The passage of 2019 PA 21, effective June 11, 2019, added several requirements to *MCL 500.3173a*, which are not applicable to this 2017 case.

App _; _ NW2d _ (Docket No. 341013, 2019), *2019 Mich. App. LEXIS 2603 at *9*, that a claimant can provide timely notice as required by *MCL 500.3174* and *MCL 500.3145(1)* by filing a lawsuit. Spectrum's August 30, 2017 complaint listed the amount of the claim, described that Benoit did not maintain a no-fault insurance policy and was not domiciled with an insured relative, and indicated that the sole involved vehicle was not insured. Even if the earlier notice failed, upon receiving notice of the lawsuit, Spectrum's claim could not be deemed "obviously ineligible" and the MACP/MAIPF was duty-bound to assign it to an insurer.

V. SIGNATURE REQUIREMENT

The MACP/MAIPF continues to argue, however, that Spectrum's application was "obviously ineligible" for assignment because its rules mandated that Benoit or her representative sign the application. **[*17]** The MACP/MAIPF contends that the claim remained "obviously ineligible" because Spectrum never submitted an amended application with a signature for the claimant or her representative.

We start by noting that*HN11*[↑] nothing in the no-fault act requires a claimant to file a claim with the MACP/MAIPF on a form application or through communication signed by the claimant. These requirements come entirely from the "Michigan Assigned Claims Plan" "adopt[ed], implement[ed] and maintain[ed]" by the MAIPF. Michigan Assigned Claims Plan, § 1. Section 5.1(A) of the Plan provides, "A claim for [PIP] benefits under the [MACP] must be made on an application prescribed by the MAIPF." The MAIPF requires that the application "be complete and signed by the claimant." Michigan Assigned Claims Plan, § 5.1(A)(1)(a). The application also "must be accompanied by reasonable proof of loss, and documentation supporting that due diligence was exercised to establish the claimant is entitled to claim benefits through the [MACP]." Michigan Assigned Claims Plan, § 5.1(B)(1).

HN12[↑] Mandating strict adherence to the minutiae of these notice provisions would be inconsistent with Michigan law. Even with the notice provisions enacted by our Legislature in the no-fault act, substantial compliance that fulfills the **[*18]** purpose of the statute is sufficient to preserve a claim. *Perkovic v Zurich Am. Ins. Co., 500 Mich. 44, 52; 893 N.W.2d 322 (2017)*. The purpose of notice under *MCL 500.3145(1)* is simply to convey "the name and address of the claimant and . . . the name of the person injured and the time, place and nature of the injury." *Perkovic, 500 Mich at 53*. Given this purpose, the Supreme Court found adequate notice where the injured person never notified his insurer of the accident, but the healthcare provider submitted its bills for reimbursement directly to the insurer. *Id. at 47-48*. The notice provided under *MCL 500.3145(1)* need not even be in writing. *Linden v Citizens Ins Co of America, 308 Mich App 89, 95; 862 NW2d 438 (2014)*.

HN13[↑] Ultimately, the MACP/MAIPF has only those rulemaking powers conveyed to it by the Legislature. See *Consumers Power Co v Public Serv Comm, 460 Mich 148, 155-156; 596 NW2d 126 (1999)*. The MACP/MAIPF's powers must derive from *MCL 500.3171* to *MCL 500.3179*. The Legislature authorized the MAIPF's board of governors to adopt an MACP. *MCL 500.3171(3)*. However, the authority to adopt a plan does not grant the authority to establish rules governing the processing, timing, and review of claims under the MACP; those requirements are enumerated by statute. *Jackson v Secretary of State, 105 Mich App 132, 138-140; 306 NW2d 422 (1981)*. While the Legislature subsequently enacted *MCL 500.3173a*, giving the Secretary of State and then the MAIPF the limited authority to deny claims that are "obviously ineligible," the Legislature did not substantively alter the remainder of the no-fault act to expand **[*19]** the MAIPF's authority. Under the act, notice is "reasonable proof of the fact and of the amount of loss sustained." *MCL 500.3142(2)*. As our Supreme Court has stated in an analogous context, *HN14*[↑] an insurer cannot vitiate its statutory duty to pay benefits in a timely fashion through a contractually agreed upon condition precedent; rather, once it receives reasonable proof of the fact and amount of loss sustained, the insurer must comply with its statutory duty to pay. See *Cruz v State Farm Mut Auto Ins Co, 466 Mich 588, 600; 648 NW2d 591 (2002)*. Similarly, once the MAIPF receives reasonable proof of the fact and amount of loss sustained by a claimant eligible to claim benefits as stated in *MCL 500.3172(1)*, it must "promptly assign the claim in accordance with the plan." *MCL 500.3174*.

Contrary to the MACP/MAIPF's contention, *HN15*[↑] *MCL 500.3175* did not grant it authority to impose filing requirements beyond those provided in the statutes. *MCL 500.3175* includes a list of elements that the MAIPF was required to incorporate into the MACP when power transferred to the MAIPF from the Secretary of State. The statutory provisions address the transfer of claims already assigned or filed under the Secretary of State's plan to the MAIPF's plan and the allocation of costs during the crossover period. The purpose of the statute was to set the **[*20]** start date for filing claims with the new MACP, not to confer additional rulemaking authority. The existence of similar filing requirements in the administrative rules promulgated by the Secretary of State under the former MACP also does not control the outcome here. The fact that no court was asked to invalidate the old administrative rule requiring a signed application is not dispositive and does not establish that the Secretary of State had the statutory authority to promulgate the rule and deny claims for noncompliance.

HN16[↑] The MACP/MAIPF is tasked only with making the initial determination of eligibility of a claim and may only deny a claim if it is "obviously ineligible." *MCL 500.3173a(1)*. Eligibility is determined by the conditions outlined in *MCL 500.3172(1)*, not by the form in which the notice is given. The MACP/MAIPF could request that the claimant amend the notice to comply with its form application to make its tasks more manageable, but it could not declare the claim to be obviously ineligible based on a minor nonconformity. As Spectrum's claim was not "obviously ineligible," the MACP/MAIPF was required to assign it to a member insurer.

As the MACP/MAIPF has conceded that the documentation presented by **[*21]** Spectrum during this suit supports assignment of the claim to a member insurer, there is no ground to remand this matter for further consideration. Accordingly, we reverse the award of summary disposition in the MACP/MAIPF's favor and remand for entry of summary disposition in favor of Spectrum. We do not retain jurisdiction.

/s/ Brock A. Swartzle

/s/ Elizabeth L. Gleicher

/s/ Michael J. Kelly

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